SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM ARNOLD PROCTOR, Defendant and Appellant.	S004555/CR23185

Following the guilt phase of a jury trial held in Shasta County, defendant William Arnold Proctor was found guilty of various offenses committed against Mrs. Bonita Stendal: first degree murder (Pen. Code, §§ 187, 189),1/ forcible rape (§ 261, subd. (2)), and first degree burglary (§ 460). The jury also found that defendant inflicted great bodily injury (§ 12022.8), and found true the special circumstance allegations that he committed the murder in the course of rape (§ 190.2, subd. (a)(17)(iii)), in the course of first degree burglary (§ 190.2, subd. (a)(17)(vii)), and with

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1/ All further statutory references are to the Penal Code unless otherwise indicated.

SEE CONCURRING AND DISSENTING OPINIONS

the infliction of torture (§ 190.2, subd. (a)(18)). After the court declared a mistrial as to the penalty phase of the trial, defendant's motion for change of venue was granted as to that phase, and after further proceedings a jury in Sacramento County imposed the death penalty. After denying defendant's motion for modification of the verdict, the court sentenced defendant to death. This appeal is automatic. (§ 1239, subd. (b).) We affirm the judgment in its entirety.

FACTS

The evidence at trial established that on the evening of April 21, 1982, defendant entered the residence of Mrs. Bonita Stendal, a widow living alone, and sometime that evening or early the next morning, raped, tortured, and murdered her. Defendant then transported her body in the trunk of her automobile to a site near a lake 12 miles away, where he pushed the body off an embankment.

I. GUILT-PHASE EVIDENCE

A. The prosecution's case.

1. The crimes.

Mrs. Bonita Stendal, 55 years of age, lived on Ponderosa Street in Burney, a small mountain community located 35 miles east of Redding in Shasta County. Mrs. Stendal taught first grade students at the East Burney Elementary School. The last person (other than defendant) to see her alive on the evening of April 21, 1982, was a fellow schoolteacher, Robert Schmidt, who briefly spoke with her at

the supermarket in Burney and then encountered her 10 minutes later at the nearby drugstore, approximately 7:50 p.m.

Later the same evening, Mrs. Stendal's neighbor, Patty Olinger, was seated in her automobile as it was being pushed through the intersection at Marquette and Ponderosa Streets, when she observed Mrs. Stendal's muddy vehicle parked in the driveway of Mrs. Stendal's residence on Ponderosa Street.[2/] During the two-year period of their acquaintance, Olinger had known Mrs. Stendal always to park her vehicle inside her garage and never in the driveway, and had known her always to keep her vehicle clean. Olinger observed the lights on inside Mrs. Stendal's residence at this time.

Approximately 8:55 a.m. the following morning, Dena Humble, the secretary at Mrs. Stendal's school, was notified that Mrs. Stendal had failed to arrive. Upon telephoning Mrs. Stendal's residence and receiving no response, she telephoned Mrs. Stendal's next-door neighbor and teaching assistant, who informed Humble she did not know where Mrs. Stendal was. Humble then proceeded to Mrs. Stendal's residence, letting herself in the unlocked door and walking through the house when no one responded to her knock. Humble noticed a fork was on the kitchen counter, and the oven door was open. Inside

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2/ This witness testified she observed the vehicle in that condition and location, approximately 7:50 p.m. that evening. This reported time does not correlate with the testimony of other witnesses as to the relevant time periods.

the garage, Humble noticed a light was on and both of Mrs. Stendal's automobiles were inside. Returning to school, Humble notified the police.

Approximately 9:30 that morning, Sergeant Larry Jarrett of the Shasta County Sheriff's Department conducted a brief search of the Stendal residence. He observed that the house was very neat overall. There was an open pickle jar and carving fork on the kitchen counter, and a drawer containing carving forks and large knives was partly open. In the bedroom, the bed was covered only by a sheet.

Sergeant Jarrett departed to report to his superior, Lieutenant Phil Eoff, and shortly thereafter, accompanied by Sergeant Michael Shaeffer, an officer specializing in evidence and identification, they searched the residence more thoroughly. This time, the officers noticed that the telephone lines leading to the kitchen and den telephones had been severed, and the drapes in the den had been pulled off the hooks at one end. The officers also observed that one of the two vehicles in the garage was muddy, water was dripping from its fender wells, and there were wipe marks across the entire outside lid of its trunk. After a locksmith opened the trunk, it was discovered that the items inside appeared to have been pushed into the outer edges of the trunk, and the dust inside recently had been disturbed.

At 4 p.m. that same day, April 22, 1982, newlyweds Robert and Susan Porter stopped their vehicle on the shoulder

of the road near an embankment at Lake Britton, located 12 miles from Burney, in order to let out their dog and take a photograph of the scenery. When Robert Porter looked over the embankment, he discovered a body lying approximately 11 feet from the road. The couple telephoned law enforcement authorities and waited by the body for their arrival.

Sergeant Jarrett identified the body as that of Mrs. Stendal. It appeared to have been thrown from the roadway. Tire tracks of the same design as those made by the tires on Mrs. Stendal's automobile ran perpendicular to the road, and, from the tire tracks, drag marks led to the top of the embankment. The body was clad in a nightgown pulled up to the waist, and an unknotted scarf was draped around the neck. A green electric blanket covered the body. The hands were tied behind the victim's back with four sets of ligatures, made of cloth and nylons, by means of various types of "half-hitch" knots. There were some cuts and "damage" to the face.

On the morning of April 23, Sergeant Jarrett, accompanied by Shaeffer and several other experts, returned to Mrs. Stendal's house in order to take photographs and obtain fingerprints. Beneath an area rug on the bedroom floor, they discovered a small pool of blood, still damp, which proved to be the same type as Mrs. Stendal's blood. Other bloodstains were located on the knob of the bedroom dresser.

That same day, the authorities brought several longtime acquaintances of Mrs. Stendal into the residence.

These individuals observed that a brown or beige purse she frequently used was missing, and that certain circumstances, such as the unlocked front door and missing bedspread and blanket, were unusual because Mrs. Stendal always locked the residence and kept it very neat.

On April 24, Dr. Boyd Stephens of the San Francisco County Coroner's office performed an autopsy on the body. He estimated that Mrs. Stendal had been killed some time between the early evening hours of April 21 and the early morning hours of April 22. She was not killed at the location at which her body was found but had been transported there after death.

In Dr. Stephen's opinion, Mrs. Stendal's death was caused by asphyxiation, initiated by nonfatal manual strangulation and later by ligature strangulation. The face had suffered numerous cuts and bruises from a blunt force. The eyes were swollen shut and the nose and lips also were swollen. Dr. Stephens believed that most of these injuries resulted from seven to nine blows. There were various internal injuries in the area of the neck. There were a number of shallow stab wounds and incisions caused by dragging a weapon across the skin in the area of the neck. The curvature of some of the injuries indicated they had been inflicted slowly and deliberately. There were seven wounds less than two inches deep to the area of the right breast which had been inflicted while Mrs. Stendal still was alive

but unable to move away from her assailant. In Dr. Stephens' opinion, these wounds were inflicted for the purpose of causing pain or fear.

Prior to death, Mrs. Stendal had suffered four stretching injuries on the labia and a fifth injury which extended into the opening of the vagina. In the coroner's opinion, four of these probably were caused by a foreign object, and the fifth, probably by a penis. There was no semen inside or on the body.

Also while alive, Mrs. Stendal had received a blunt-force injury to the area of her right kidney. There also were blunt-force injuries to her left foot. The ligatures used to tie her hands were tied so tightly they had cut into her wrists. There were post-mortem abrasion injuries attributed to dragging the body.

On April 30, the officers returned to the Stendal residence to perform a systematic investigation. On this occasion, they noticed small amounts of blood on the bedroom nightstand. After dismantling and removing the bed, they found, near the location of the head of the bed, approximately one dozen pamphlets. Some of the pamphlets had blood on them and one appeared to contain a bloody palm print. Other latent palm prints were obtained from the booklets. The blood on some of the pamphlets later was identified as being of the same type as Mrs. Stendal's. The door to the master bedroom on the side facing the den appeared to have been wiped with a damp, dirty rag.

On May 2, Sergeant Jarrett returned to the residence and noticed a cigarette butt from an unfiltered cigarette lying outside a window of the residence; there were also indications a hand had been on the window sill (although no fingerprints could be obtained).

2. Evidence of defendant's involvement.

In view of the circumstantial nature of the evidence connecting defendant to the commission of the crimes, and the nature of the defense that was presented at trial, we consider it necessary to set forth in substantial detail the evidence relating to defendant's activities immediately preceding and following the commission of the murder.

Mrs. Stendal's son David (who was approximately 21 years of age at the time of trial) had lived with Mrs. Stendal until 1979, when he moved to Chico. David had known defendant (20 years of age at the time of trial) and Robert Manley (26 years of age at the time of trial) for several years and often had smoked marijuana with them. David had concealed marijuana in various locations within the Stendal residence until sometime in 1979 or 1980. Manley resided with his mother, Neta Manley, less than one block from the Stendal residence.

From February 18, 1981, to April 9, 1982, defendant was not present in the Burney area. In late January 1982, defendant commenced a four-week general truck-driving course at Western Truck School, where he received instruction in

tying knots. Students at the school were taught to tie several types of trucker's-knots, which knots were identical to those found on the ligatures used to bind Mrs. Stendal's wrists.

Approximately two weeks prior to the murder of Mrs. Stendal, defendant returned to live with his mother and two brothers in Burney. In the early morning hours of either Friday or Saturday, April 16 or 17, defendant and Robert Manley made four or five obscene or "crank" telephone calls from the Manley residence to various Burney residents. Robert Manley telephoned Mrs. Stendal and told her he would like to have sexual relations with her. Defendant made a separate obscene telephone call to an unnamed person.

On April 21, 1982, defendant hitchhiked to the Manley residence, arriving approximately 2 p.m. Mrs. Manley returned from work at 3 p.m. Prior to 5 p.m., Mrs. Manley drove defendant to a market in Burney to purchase liquor. When they returned to the Manley residence, the three had a drink and then ate dinner at 5 p.m. Approximately 5:30 p.m., defendant and Robert Manley walked to a local convenience store, where Manley purchased two packs of unfiltered Camel cigarettes (the brand and type they both smoked), giving one pack to defendant. They returned to the Manley residence to drink and watch a baseball game on television, and remained there after Mrs. Manley departed at 7 p.m. Defendant had three or four drinks. The baseball game commenced

approximately 7:35 p.m. Between 8 p.m. and 8:30 p.m., defendant telephoned his mother to report he was at the Manley residence and intended to remain there for the night.

Approximately 8:30 p.m. defendant departed, informing Robert Manley that he was going to one of the local bars to "pick up" a woman and would return later to spend the night. When he left, defendant was wearing thongs, white socks, blue jeans, a blue shirt, and a gold-colored windbreaker borrowed from Robert Manley, because defendant did not have his own jacket with him. Shortly after 8:30 p.m., defendant arrived at the residence of his friend Jeffrey Bohall, who lived five to six blocks from the Manley residence and four to five blocks from the Stendal residence. Defendant remained at that location until sometime before 10 p.m., when he departed in order to have a few drinks and "get a piece of butt." Defendant inquired whether Bohall wanted to accompany him but Bohall declined. Bohall's mother, Juanita Bohall, who was home during defendant's visit, testified that defendant was wearing blue jeans and an off-white or cream-colored lightweight jacket with a rust-brown trim. She could not clearly remember his shoes but thought they were light weight.

When Mrs. Manley returned to her residence between 10:30 p.m. and 11 p.m. that evening, defendant was not present. When Robert Manley retired at 2:30 a.m. after watching the baseball game and a late-night movie, defendant still had not returned. When Mrs. Manley left for work

between 5:30 and 6 a.m., defendant was not at the Manley residence. According to defendant's mother, Julia Proctor, defendant did not return to the Proctor residence during the night of April 21.

After sunrise, at 5:30 a.m. on the morning of April 22, defendant's aunt, Sharon Palkki, observed defendant walking across the street in front of Palkki's residence, which was located approximately 500 feet from Mrs. Stendal's residence, several miles from defendant's residence in Johnson Park on the outskirts of Burney. Defendant was wearing loose-fitting blue jeans, white socks, and sandals, and what appeared to be a pair of gloves was dangling from his right pants pocket. Between 6 a.m. and 7 a.m., defendant telephoned his brother, Ed Proctor, instructing him to have their mother give defendant a ride home from the local market. Another witness observed defendant telephoning from that location during the same time period. When defendant's mother picked him up, defendant was wearing blue jeans and a gold-colored windbreaker, which she did not recognize. His mother did not remember the type of footwear defendant was wearing but testified he owned a pair of thongs.

Approximately 11:30 a.m. on April 22, Robert Manley arose and telephoned defendant, who informed Manley that defendant had seen his (defendant's) mother downtown the previous evening and had driven home with her. When Robert Manley asked defendant whether he had watched the baseball

game, the late-night movie, or any other television program at home, defendant responded he had not, and stated he was tired and wanted to sleep. Defendant agreed to meet Robert Manley after doing defendant's laundry. Later that day, Robert Manley and his mother drove to the Proctor residence, where they picked up defendant. They proceeded to Redding in order to purchase tickets to a concert. Defendant returned Robert Manley's jacket at that time, and Manley observed it was cleaner than it had been when he had given it to defendant the previous evening. After being dropped off and obtaining the tickets, Robert Manley and defendant met two women and spent the night with them at a motel in Redding.

On the morning of April 23, Shasta County officers brought defendant and Robert Manley to the sheriff's station for questioning. Defendant told Sergeant Jarrett that he had been at Robert Manley's residence until 8:30 p.m. on April 21 and then had gone into Burney. Defendant stated he had received a ride home that evening from an unidentified man in a pickup truck. At his residence, defendant had sharpened some knives for his mother, and had been home several hours before retiring at 11 p.m. Defendant did not arise until 9 a.m. on April 22, and did not leave the residence until after 3 p.m., when he went to Redding with Robert Manley and spent the night at a motel. Defendant showed Jarrett a motel room receipt, which defendant volunteered he had kept "for an alibi in case anything flared up." Defendant denied having visited Mrs. Stendal's residence.

Defendant was placed in custody for a parole violation he admitted to the officers. One of the officers observed that defendant had suffered abrasions below each knee, and that there were what appeared to be five or six somewhat parallel scratch marks above defendant's right knee. On April 24, Dr. Stephens examined defendant's leg injuries and determined they probably were two days old, and had not been sustained through any layers of clothing but rather while defendant's legs were uncovered. The injuries were similar to injuries Dr. Stephens had observed in other sexual assault cases.

On May 1, Mrs. Proctor visited defendant in custody and afterward informed one of the detectives that her son had asked her to tell Sergeant Jarrett that he had been at home on the night of the murder. When Mrs. Proctor had advised defendant she already had told Jarrett otherwise, defendant asked her to tell Jarrett that defendant had been at a party that evening.

The bloody palm print obtained from one pamphlet proved to match defendant's palm print, and the other, latent palm prints obtained from the booklets also matched defendant's palm prints. A very faint print from footwear was found at the location where the body was discovered and proved to be similar in design to the tread of a pair of thongs recovered from defendant's possession. On May 2, defendant was placed under arrest for the murder of Mrs. Stendal.

B. The defense case.

Defendant had known Robert Manley for several years prior to the murder. He testified he was acquainted with David Stendal, had known Mrs. Stendal approximately three to four years, and had been inside the Stendal residence on twenty or thirty occasions. Defendant testified that Manley and David Stendal had used marijuana and amphetamines on many occasions, and Manley had broken into the Stendal residence on at least two prior occasions. A defense investigator testified that Manley had informed him that one of the entries had been for the purpose of locating drugs.

Defendant testified that, after drinking the previous evening, he had awakened on the Monday or Tuesday morning prior to the day of the murder, with the bruises on his legs which the officers later had noticed. Defendant further testified that on the afternoon of April 21, 1982, he and Manley drank whiskey mixed with cola at the Manley residence. Defendant and Manley wanted to attend a concert in Chico, and Manley began to talk of retrieving various drugs which he knew David Stendal had secreted in the Stendal residence, and which defendant believed Manley intended to sell in order to raise money to purchase the tickets. After having two or three drinks, defendant left the Manley household shortly after 8:30 p.m. and proceeded to Jeffrey Bohall's residence, where he remained until 9:30 or 10 p.m. After Bohall refused to accompany defendant to "party,"

defendant left on foot to purchase Camel Light, filtered cigarettes (his brand and type) at a liquor store. The walk to the store took him one and one-half hours, and he returned to Manley's residence approximately midnight.

Upon arriving, defendant was unable to locate Manley and retired to an upstairs bedroom. Defendant awoke several hours later, at dawn on April 22. Defendant could not find Manley, but at this time discovered a note addressed to defendant on the side of the dresser, notifying him that Manley had departed to "check Stendal's stash" and would return shortly. Defendant decided to follow Manley to the Stendal residence.

When defendant arrived, the garage door was open but Mrs. Stendal's automobile was not inside the garage. The lights were turned on in the front room, and after no one responded to his knock, defendant entered through the unlocked sliding glass door. Defendant did not locate either Robert Manley or Mrs. Stendal, but noticed a puddle of blood next to the bed that he "just kind of tested" by touching it with the back of his hand. He noticed some pamphlets between the bed and a nightstand but did not recall touching the pamphlets upon which his palm prints later were detected. Defendant immediately ran out the back door to the market, where he telephoned his mother to ask that she pick him up. At home, defendant slept for several hours and telephoned Robert Manley approximately 1:30 p.m. on April 22. He did not launder his clothing.

After defendant and Manley were dropped off in Redding by Manley's mother, Manley told defendant that the previous evening, Mrs. Stendal had become ill and Manley had driven her to the hospital. Manley could not explain to defendant why there was blood on the floor of the Stendal residence.

The jury found defendant guilty of first degree murder, rape, and burglary, with an enhancement for great bodily injury, and found true the three charged special-circumstance allegations. After the jury could not agree as to penalty, a mistrial was declared. Defendant renewed his motion for change of venue, which was granted, and retrial of the penalty phase was conducted in Sacramento County.

II. PENALTY-PHASE EVIDENCE

A. The prosecution's case.

The prosecution presented evidence to the Sacramento County jury substantially similar to the evidence presented to the Shasta County jury, including the following: that Mrs. Stendal was last seen alive shortly before 8 p.m. on April 21, 1982; that when she failed to appear the following day for school, a brief search commenced; that the body was discovered on April 22, 1982; and that subsequent forensic examination of the body revealed the injuries described above. The evidence obtained at Mrs. Stendal's residence was presented, as was the testimony of Mrs. Manley and Robert Manley concerning

defendant's actions and whereabouts on the evening of the murder. The two witnesses who had observed defendant near the murder scene early on the morning of April 22, 1982, testified. The prosecution presented the evidence of defendant's familiarity with trucker's-knots. In addition, the prosecutor and defense counsel stipulated that in 1980 and 1981, defendant had suffered two second degree burglary convictions, and in 1981 also had been convicted of vehicle theft.

B. The defense case.

The defense presented two witnesses. Defendant's brother Ed testified that defendant did not have difficulty getting "dates." At 9 a.m. on April 22, 1982, Ed returned from a trip to find defendant at the Proctor residence. From that time until 12 p.m., defendant helped Ed repair a vehicle. Defendant did not wash his clothes that morning.

Defendant's mother testified that defendant's father left the family in 1981. Defendant had dropped out of high school after his sophomore year. Defendant's mother characterized him as a follower who was easily led. Defendant's mother had not known him to be hostile or disrespectful to women in general, or to say anything derogatory about Mrs. Stendal in particular.

At the conclusion of the penalty phase, the jury fixed the penalty at death.

DISCUSSION

I. GUILT-PHASE ISSUES

A. Motion for change of venue.

Defendant contends the trial court erred in denying his repeated motions for change of venue.[3/] Pursuant to section 1033, subdivision (a), the court must grant a motion for change of venue if "there is a reasonable likelihood that a fair and impartial trial cannot be had in the county." The phrase "reasonable likelihood" in this context "means something less than 'more probable than not,'" and "something more than merely 'possible.'" (People v. Bonin (1988) 46 Cal.3d 659, 673.) In ruling on such a motion, as to which defendant bears the burden of proof, the trial court considers as factors the gravity and nature of the crime, the extent and nature of the publicity, the size and nature of the community, the status of the victim, and the status of the accused. (People v. Edwards (1991) 54 Cal.3d 787, 807; People v. Cooper (1991) 53 Cal.3d 771, 805; People v. Bonin, supra, 46 Cal.3d 659, 672-673.)

3/ After entering a plea of not guilty on August 2, 1982, defendant on September 14, 1982, moved for a change of venue, which motion was denied summarily on September 23, 1982, on the ground the motion did not comply with California Rules of Court, rule 841. On October 8, 1982, defendant filed a second motion to change venue, which the court considered and denied on October 20, 1982. On December 7, 1982, defendant renewed his motion for change of venue, which was heard and denied on that date.

"On appeal after a judgment following the denial of a change of venue, the defendant must show both that the court erred in denying the change of venue motion, i.e., that at the time of the motion it was reasonably likely that a fair trial could not be had, and that the error was prejudicial, i.e., that it [is] reasonably likely that a fair trial was not in fact had. [Citations.]" (People v. Edwards, supra, 54 Cal.3d 787, 807, italics added; People v. Cooper, supra, 53 Cal.3d 771, 805-806.)

With regard to the first part of the showing required of a defendant on appeal, we employ a standard of de novo review to the trial court's ultimate determination of the reasonable likelihood of an unfair trial. (People v. Edwards, supra, 54 Cal.3d 787, 807; People v. Cooper, supra, 53 Cal.3d 771, 805-806; People v. Bonin, supra, 46 Cal.3d 659, 676-677.) This requires our independent determination of the weight of the five controlling factors described above. (People v. Bonin, supra, 46 Cal.3d 659, 676-677; People v. Balderas (1985) 41 Cal.3d 144, 177.) With regard to the second part of the showing, in order to determine whether pretrial publicity had a prejudicial effect on the jury, we also examine the voir dire of the jurors. (People v. Howard (1992) 1 Cal.4th 1132, 1167; People v. Anderson (1987) 43 Cal.3d 1104, 1131; People v. Balderas, supra, 41 Cal.3d 144, 177.)

Although defendant was charged with very serious offenses, every capital case presents a serious charge. This factor adds weight to a motion for change of venue but is not dispositive. (People v. Howard, supra, 1 Cal.4th 1132, 1167; People v. Cooper, supra, 53 Cal.3d 771, 806; People v. Balderas, supra, 41 Cal.3d 144, 177.) The nature of the acts committed upon the victim is a factor that would tend to support a change of venue, but not to the degree of a case involving serial murders, for example. (Compare People v. Jennings (1991) 53 Cal.3d 334, 360.)

Defendant urges that the second factor, the nature and extent of pretrial publicity, virtually compelled a change of venue. In support of his renewed motion, defendant produced copies of articles appearing in two newspapers (six in the Inter-Mountain News, and approximately twenty in the Redding Record Searchlight, between April 1982 and August 1982) and more than sixty copy-notes from local television or radio broadcasts which aired during the same period. Many of these news reports detailed the condition in which Mrs. Stendal's body was found and the circumstances of her death; several included the circumstance that defendant's palm print had been found at the murder scene, and several reported that the prosecutor intended to seek the death penalty because of the heinous nature of the crime.

The defense also produced the results of a telephone public-opinion survey conducted on September 21 and 22, 1982.

The survey revealed that of 169 persons contacted, 136 (or 80 percent of those contacted) had heard of the case; 94 (or 55 percent of those contacted) had heard of an arrest having been made; 52 (or 31 percent of those contacted) had formed an opinion as to defendant's guilt, and (of those 52) 38 persons (or 70 percent) had formed their opinion from reading the Record Searchlight and 5 other persons had formed their opinion from reading the Inter-Mountain News.

Defendant urges that the results of the survey compelled a change of venue. The degree of exposure indicated by the survey, however, was not greater than in other cases in which a change of venue has not been required. (See, e.g., People v. Jennings, supra, 53 Cal.3d 334, 359, 361 [72 percent recalled the offenses and 31 percent believed there was a very strong case against the defendant]; People v. Coleman (1989) 48 Cal.3d 112, 135 [46.3 percent recalled the crime and 31.4 percent believed the defendant was probably or definitely guilty].)

An additional consideration is that the impact of the publicity may be mitigated due to the lapse of time between publication or issuance of news reports and commencement of jury selection. (E.g., People v. Jennings, supra, 53 Cal.3d 334, 361 [publicity eleven months prior to trial did not require change of venue]; People v. Anderson, supra, 43 Cal.3d 1104, 1130 [danger of prejudice significantly reduced with lapse of five months]; People v. Welch (1972) 8

Cal.3d 106, 113-114 [news reports ending just over one month prior to trial did not require venue change].) Passage of time weighs against a change of venue. (People v. Edwards, supra, 54 Cal.3d 787, 808.)

In the present case, the lapse of nearly three months between the issuance of the last report on August 17, 1982, and the commencement of jury selection on November 10, 1982, helped dispel the potentially prejudicial effect of the news reports of the killing. Although the extent and content of the pretrial publicity indicates a potential for prejudice, the circumstances that the reports had abated in the months preceding the trial, and that trial was held in Redding (35 miles from Burney), a larger community not the locus of the crime, lead us to conclude that a change of venue based upon pretrial publicity was not strongly indicated.

The next factor to be considered is the size of the community. "'The larger the local population, the more likely it is that preconceptions about the case have not become imbedded in the public consciousness.' [Citation.]" (People v. Jennings, supra, 53 Cal.3d 334, 363.) The size of the county by itself is not determinative; rather, the critical factor is whether it can be shown that the size of the population is large enough to neutralize or dilute the impact of adverse publicity. (Ibid.)

Defendant's trial took place in late 1982. Shasta County, which encompasses 3,850.2 square miles (State of Cal.,

Cal. Statistical Abstract (1984) table A-1, p. 2), then had a population of approximately 122,100, ranking it 28th out of 58 counties in the state (State of Cal., Cal. Statistical Abstract, supra, table B-3, p. 15). As defendant has pointed out, cases involving counties with populations of similar size more frequently have occasioned venue changes than cases involving more populous counties. (See People v. Balderas, supra, 41 Cal.3d 144, 178-179.) We do not agree with the suggestion, however, that every case involving the death penalty merits a change of venue if it arises in a county of this size. Therefore, although this factor weighs somewhat in favor of a change of venue, it is not determinative.

The fourth and fifth factors are the respective status and prominence of the defendant and his victim. In the town of Burney, Mrs. Stendal was a well-known and apparently well-liked active participant in the community, had 20 years' experience in the Burney school system, and was described as having "taught everyone's kids." It does not appear that she had any particular prominence or status in the greater-county area outside the small, isolated town (Burney then had a population of approximately 3,000) in which she lived. Defendant also was a long time resident of Burney, whose ties to the community were interrupted only by the fairly brief periods he spent at California Youth Authority facilities. Although he previously had been convicted of several

nonviolent felony offenses, and news accounts after the murder reported his prior confinement at the California Youth Authority on a burglary commitment, he was by no means a stranger to, or friendless in, the community (see People v. Balderas, supra, 41 Cal.3d 144, 179), and the degree of his prior criminal involvement does not appear to have earned him any great notoriety even in the small community of Burney. Although the respective positions of the victim and defendant within the community might lend support for a change of venue, this factor does not weigh heavily in favor of a change of venue.

Considered in total, the above described factors do not strongly weigh in favor of or against a change, but simply indicate a venue change might have been desirable. It appears that, although he established the possibility of an unfair trial in this venue, defendant failed to carry his burden of proving there was a reasonable likelihood that jurors drawn from Shasta County would have formed such fixed opinions as a result of the pretrial publicity that they could not make the required determinations with impartiality. (See People v. Bonin, supra, 46 Cal.3d 659, 678.)

Considering the relative closeness of the issue, however, we turn next to the question whether any error in the trial court's ruling -- that defendant did not carry his burden -- would be prejudicial, that is, whether the record demonstrates a reasonable likelihood he did not in fact

receive a fair trial. With this purpose in mind, we consider the jury voir dire to determine whether the jurors may have been prejudiced by the pretrial publicity surrounding the case, bearing in mind that no presumption of a deprivation of due process of law arises from juror exposure to publicity concerning the case. (People v. Daniels (1991) 52 Cal.3d 815, 853.)

In People v. Cooper, supra, 53 Cal.3d 771, prejudice was not shown where only three jurors had been exposed to "'prejudicial information'" concerning the case and on examination all the jurors had stated they could be fair. (Id., at p. 807.) In People v. Jennings, supra, 53 Cal.3d 334, prejudice was not established where voir dire of the selected jurors demonstrated they were not "tainted" by the modest pretrial publicity. (Id., at p. 363.) In People v. Bonin, supra, 46 Cal.3d 659, prejudice was not demonstrated where even though prior to trial 10 of the 12 jurors and 3 of the 4 alternates had been exposed to news coverage, most had received indirect and minimal exposure. (Id. at p. 678.) In People v. Anderson, supra, 43 Cal.3d 1104, no prejudice was found where eight of the selected jurors had no knowledge of the facts or the issues, three of the others had read little about the case, one recalled the case in general terms but in none of its details, and each juror stated he or she had formed no opinion and could and would reach a decision based on the evidence presented at trial. (Id., at p. 1131.) In

People v. Balderas, supra, 41 Cal.3d 144, no prejudice was demonstrated where six of the selected jurors professed pretrial ignorance of the case, four recalled reading reports, but none had followed the case or recalled many details. All of the selected jurors stated they could set aside any impressions obtained outside the courtroom and could consider the evidence without being prejudiced by the pretrial publicity. In People v. Welch, supra, 8 Cal.3d 106, each of the selected jurors was unfamiliar with the facts, had not formed any opinion of the defendant's guilt or innocence, or stated he or she could act fairly and impartially. (Id., at p. 114.)

In the present case, defendant points out that all but three jurors had watched on television, heard on the radio, or read in the newspapers something concerning the case. Our review of the record reveals, however, that most of those jurors had received only minimal pretrial exposure to the case, that such exposure took place during a period well before commencement of the trial, that the jurors had not been informed of the evidence linking defendant to the case but only that the murder had occurred, and that when questioned on the subject, all of these jurors attested to their ability to put aside everything they had learned about the case and to decide the issues based solely on the evidence presented at trial.

We also observe that, in renewing the motion upon completion of jury selection, defendant did not rely upon the substance of the answers actually given in voir dire to contend the jurors had formed opinions based upon pretrial publicity; defendant, in fact, acknowledged the assurances of the jurors that they would put aside any prior knowledge of the case. Rather, defendant only reiterated the point made earlier that, based on the percentage of persons answering defendant's telephone poll who indicated they had formed an opinion, it was reasonably likely some of those who actually served on the jury also had formed an opinion, no matter what their responses had been in the voir dire on this subject.

Finally, defendant urges that the circumstance that the trial court granted his motion for a change of venue prior to retrial of the penalty phase suggests the trial court belatedly recognized the true potential for prejudice. The record demonstrates, however, that upon defendant's renewal of his motion at the conclusion of the first trial of the penalty phase, the court expressly granted the motion on the ground that there had been intensive additional publicity during the entire guilt and penalty phases of the trial, which the media had attended on a daily basis, and therefore the likelihood of a fair trial in the county had diminished.

Having considered the totality of the evidence, we conclude defendant has not met his burden on appeal of

demonstrating both that it was reasonably likely he could not receive a fair trial in Shasta County absent a change of venue, and that it was reasonably likely he did not in fact receive a fair trial. Therefore, reversal is not required.

B. Sufficiency of the evidence.

1. First degree murder.

In support of the allegation of first degree murder, the prosecution proceeded upon three alternate theories: premeditation and deliberation, torture murder, and felony murder (based upon the commission of rape and burglary). According to defendant, his guilt was not proved under any of these theories.

Having reviewed the entire record in the light most favorable to the judgment and presuming the existence of every fact the trier of fact reasonably could have deduced from the evidence, we conclude that a rational trier of fact could have found beyond a reasonable doubt the essential elements of defendant's guilt under each of these theories of first degree murder. (People v. Pensinger (1991) 52 Cal.3d 1210, 1237; People v. Johnson (1980) 26 Cal.3d 557, 576.)

a. Premeditation and deliberation.

In a case, such as the present one, based upon circumstantial evidence, we must decide whether the circumstances reasonably justify the findings of the trier of fact, but our opinion that the circumstances also might reasonably be reconciled with a contrary finding would not

warrant reversal of the judgment. (People v. Perez (1992) 2 Cal.4th 1117, 1124.)

In order to ascertain whether the evidence is sufficient to sustain a finding of first degree murder based upon premeditation and deliberation, we generally examine whether there is evidence of planning, motive, or method, although these factors are not exclusive. (People v. Perez, supra, 2 Cal.4th 1117, 1125; People v. Thomas (1992) 2 Cal.4th 489, 517; People v. Raley (1992) 2 Cal.4th 870, 887; People v. Edwards, supra, 54 Cal.3d 787, 813-814.) When the record discloses evidence in all three categories, the verdict generally will be sustained. Otherwise, convictions for first degree murder typically have been upheld where there is "'either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing.' [Citations.]" (People v. Raley, supra, 2 Cal.4th 870, 887.)

Our review of the record reveals evidence falling within all three categories. With respect to planning, the evidence (the unfiltered cigarette butt found near a window and a handprint on the windowsill) supports an inference defendant spent a period of time just outside Mrs. Stendal's residence observing her, before entering to commit the offenses. Once inside, defendant rendered the victim subject to his complete control by tying her hands and cutting the

telephone lines. After binding the victim, defendant had a significant period of time in which to contemplate and plan her eventual death as he engaged in various acts of torture. (See People v. Raley, supra, 2 Cal.4th 870, 887.)

Although evidence of defendant's motive is less clear, a rational trier of fact could have determined that defendant's motive in murdering Mrs. Stendal was to avoid detection for the sexual and other physical abuses he had committed against her. (See People v. Perez, supra, 2 Cal.4th 1117, 1126; People v. Raley, supra, 2 Cal.4th 870, 887; People v. Turner (1990) 50 Cal.3d 668, 688.)

Finally, the manner of killing supports a finding of premeditation. The evidence establishes that defendant sequentially strangled the victim -- first manually, and then by means of ligature -- after subjecting her to prolonged physical abuse through the infliction of various types of wounds, some of which were not random. During the infliction of these wounds, defendant could have quickly dispatched the victim by means of stabbing and beating, had he chosen to do so. These circumstances do not suggest an unreflecting explosion of violence, but rather a preconceived design to kill the victim by the particular means chosen, and to prolong her agony in the process. (People v. Edwards, supra, 54 Cal.3d 787, 814; see People v. Raley, supra, 2 Cal.4th 870, 887.) Therefore, we conclude the evidence, although circumstantial, affords an adequate foundation for an

inference of premeditation and deliberation, and is sufficient to support such a conclusion by a rational trier of fact.

b. Torture murder.

The evidence also is sufficient to support the finding that defendant killed the victim with the intent to torture her. "'Torture murder is "murder committed with a wilful, deliberate and premeditated intent to inflict extreme and prolonged pain." [Citation.]'" (People v. Raley, supra, 2 Cal.4th 870, 888, quoting People v. Pensinger, supra, 52 Cal.3d 1210, 1239.) Such intent, considered sufficiently culpable to warrant punishing the perpetrator for first degree murder, is the calculated intent to cause pain for "'"the purpose of revenge, extortion, persuasion or for any other sadistic purpose."'" (People v. Raley, supra, 2 Cal.4th 870, 888, quoting People v. Wiley (1976) 18 Cal.3d 162, 168; see also People v. Bittaker (1989) 48 Cal.3d 1046, 1101; People v. Davenport (1985) 41 Cal.3d 247, 267.) "However, there must be a causal relationship between the torturous act and death, as Penal Code section 189 defines the crime as murder 'by means of' torture. [Citation.]" (People v. Pensinger, supra, 52 Cal.3d 1210, 1239, quoting People v. Davenport, supra, 41 Cal.3d 247, 267.)

Defendant, relying upon the evidence that the numerous "drag" knife wounds across the victim's chest apparently were not inflicted for the purpose of causing death and did not cause death, asserts that no causal relationship exists between these torturous acts and Mrs. Stendal's death.

This assertion ignores the additional evidence that her death was caused by manual and ligature strangulation after she not only had been bound, beaten, and stabbed in the manner just described, but also had received a series of additional injuries (described more fully below), inflicted over her entire body. The finding of murder-by-torture encompasses the totality of the brutal acts and the circumstances which led to the victim's death. (People v. Talamantez (1985) 169 Cal. App.3d 443, 456; see also People v. St. Joseph (1990) 226 Cal.App.3d 289, 297; People v. Hindmarsh (1986) 185 Cal.App.3d 334, 349.) The acts of torture may not be segregated into their constituent elements in order to determine whether any single act by itself caused the death; rather, it is the continuum of sadistic violence that constitutes the torture. (People v. Talamantez, supra, 169 Cal.App.3d at p. 456.)

In the present case, the victim was subjected to strangulation by two different methods, her wrists were bound so tightly as to cut into her skin, she was beaten in the face severely enough to have caused her eyes to be swollen shut and her lips to be swollen, she received severe blows to other parts of her body, and she suffered repeated, incision-type stab wounds to her neck, chest, and breast area. We conclude that this evidence amply supports the finding that Mrs. Stendal's death was brought about by torture.

Defendant additionally contends the trial court erred in instructing the jury pursuant to the then-current

version of CALJIC No. 8.24,[4/] because the evidence did not establish that the torture caused the victim's death. As explained above, there was ample evidence to demonstrate that the murder was accomplished by means of torture. Thus, the trial court did not err in giving this instruction.

Although it is in the context of his challenge to the sufficiency of the evidence to support the torture-murder special-circumstance finding that defendant also questions the sufficiency of the evidence to establish the intent to torture, for the sake of convenience we review this related claim at this point in our opinion, because intent to torture also must be present in order to sustain a conviction of first degree murder on a theory of torture murder. Again relying exclusively on the evidence of "drag" marks on the victim's chest, defendant urges that the specific intent to torture may not be inferred solely from the condition of the victim's body, because even severe wounds may be as consistent with "an explosion of violence" as with torture. (People v. Mincey (1992) 2 Cal.4th 408, 432; People v. Raley, supra, 2 Cal.4th 870, 888; People v. Davenport, supra, 41 Cal.3d 247, 268.)

4/ The version of CALJIC No. 8.24 (Cal. Jury Instns., Crim. (4th ed. 1979)), as read to the jury, provided in pertinent part: "The essential elements of [torture] murder are one, the act or acts which caused the death must involve a high degree of probability of death, and two, the defendant must commit such act or acts with the intent to cause cruel pain and suffering for the purpose of revenge, extor[t]ion, persua[s]ion or for any sadistic purpose."

Intent is a state of mind which, unless established by the defendant's own statements, must be proved by the circumstances surrounding the commission of the offense (People v. Mincey, supra, 2 Cal.4th 408, 433; see also People v. Pensinger, supra, 52 Cal.3d 1210, 1239), which include the severity of the victim's wounds. (People v. Mincey, supra, 2 Cal.4th 408, 433.)

In the present case, the coroner testified that many of the victim's wounds, particularly the knife "drag" marks, were inflicted while she still was alive but after she had been rendered incapable of avoiding further attack. The wounds revealed that a relatively slow, methodical approach had been employed in their infliction, rather than their having resulted from sudden, explosive violence. The nature of many of the wounds, including the repeated blows to the face and to other parts of the body, as well as the knife "drag" marks, suggests that they were administered over a substantial period of time and that defendant intended to inflict cruel pain and suffering on the victim. Considered with the circumstances that the victim was isolated and prevented from resisting or escaping during these acts, this evidence establishes defendant's intent to torture the victim.

c. Felony murder.

The evidence also is sufficient to support a finding of first degree murder based upon the theory of felony murder, whether the underlying felony is considered to be rape or

burglary. "We have required as part of the felony-murder doctrine that the jury find the perpetrator had the specific intent to commit one of the enumerated felonies, even where that felony is a crime such as rape. [Citations.]" (People v. Hernandez (1988) 47 Cal.3d 315, 346.) It also is established that the killing need not occur in the midst of the commission of the felony, so long as that felony is not merely incidental to, or an afterthought to, the killing. (Id., at p. 348; see People v. Hayes (1990) 52 Cal.3d 577, 631.)

Defendant urges that the only items of evidence linking him to the commission of the rape are the unfiltered cigarette butt found near the residence, his presence in the residence on the night in question, and certain marks on his legs which an expert opined were similar to marks seen on other perpetrators of sexual assaults. Defendant ignores the additional circumstantial evidence that a short time prior to the commission of the present offenses, he participated in making telephone calls of a harassing nature to various persons and was present when his companion made a call of a sexual nature to the murder victim. On the evening the offenses were committed, defendant informed one witness that he was going to pick up a woman, and another that he was going to "get a piece of butt." The evidence that Mrs. Stendal was forcibly raped, prior to her death, was uncontradicted. This evidence, considered with the circumstances that the victim

was tied in a manner consistent with defendant's formal education in the art of trucker's-knots, that the abrasions below defendant's knees and above his right knee were incurred by defendant while his legs were unclothed, and that these abrasions were consistent with injuries observed in other cases of sexual assault, amply support the jury's implied finding that defendant specifically intended to commit rape and that the rape was not a mere incident of the murder.

Defendant also urges there is insufficient evidence to support a finding of felony murder based upon the underlying felony of burglary because there is no evidence demonstrating he entered the residence with the requisite felonious intent (§ 459), in this case the intent to commit rape. Such intent usually must be inferred from all the facts and circumstances revealed by the evidence, because only rarely can it be proved directly. (People v. Matson (1974) 13 Cal.3d 35, 41.) In view of (1) the previously described evidence of defendant's conduct in the hours preceding his entry of the Stendal residence, (2) the evidence he spent a period of time immediately outside the residence, presumably contemplating his next act, and (3) the methodical manner in which defendant isolated the victim and committed the rape, the nonsexual physical abuse, and finally the murder itself, it is clear that a rational trier of fact could conclude defendant had the requisite felonious intent prior to his entry into the residence.

C. Special circumstances issues.

1. Torture-murder special circumstance.5/

Defendant contends the trial court erred in failing to instruct the jury that in order to find the special circumstance charged under section 190.2, subdivision (a)(18) (murder involving torture), to be true, it had to determine that defendant possessed the intent to torture Mrs. Stendal. (People v. Davenport, supra, 41 Cal.3d 247, 271.) The jury in defendant's case was instructed that in order to find the torture-murder special circumstance true, it must be proved: "1. That the murder was intentional, and [¶] 2. That the murder involved the infliction of torture. [¶] To prove the infliction of torture, the infliction of extreme physical pain must be proved no matter how long its duration. [¶] Awareness of pain by the deceased is not a necessary element of torture." (CALJIC No. 8.81.18 (4th ed. 1979).)

Although this instruction did not specifically inform the jury that the concept "infliction of torture" included an "intent to torture," nothing in the instruction was inconsistent with that understanding of the concept. Similarly to the juries in People v. Mincey, supra, 2 Cal.4th

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5/ As previously noted, we have discussed defendant's attack on the sufficiency of the evidence of the torture-murder special circumstance, specifically that the evidence was insufficient to establish intent to torture, in resolving defendant's related claim that the evidence was insufficient to sustain his conviction of first degree murder on a theory of torture murder. (See ante, pp. ___-___ [typed maj. opn. at pp. 30-31].)

408, 455, and People v. Wade (1988) 44 Cal.3d 975, 994, the present jury was instructed at the guilt phase both as to first degree torture murder and as to the torture-murder special circumstance. The first degree torture murder instruction specifically informed the jury that an "intent to cause cruel pain and suffering" (CALJIC No. 8.24 (4th ed. 1979)) was a required element of the offense. As in Wade, "nothing in the present record suggests the jury in this case was likely to have drawn any . . . distinction in the use of the term 'torture' in the two instructions." (44 Cal.3d at p. 994.) Also, as in Wade, "neither the prosecutor nor defense counsel suggested at any point that a torture-murder special circumstance could be established without first proving an intent to torture." (Id., at pp. 994-995.)

To be sure, as in People v. Pensinger, supra, 52 Cal.3d 1210, 1254-1255, and People v. Wade, supra, 44 Cal.App.3d 975, 990, the jury was instructed on multiple theories of first degree murder, and therefore the intent to torture may not be established on the mere basis of the guilt verdict on the first degree murder charge. In People v. Pensinger, supra, 52 Cal.3d 1210, we reversed the special circumstance finding because, in addition, neither the prosecutor nor defense counsel discussed the issue whether the defendant had intended to torture the victim, either in the context of the murder-by-torture theory of first degree murder or the torture-murder special circumstance. (Id., at p. 1255.)

In the present case, by contrast, the prosecutor in closing argument repeatedly stressed that defendant's intent was to cause cruel pain. For example, the prosecutor asserted: "He wanted to murder her but he wanted her to die slowly and he wanted her to feel her death." Defense counsel also repeated the instruction on intent to torture. Finally, in rebuttal, the prosecutor reiterated that the prosecution's evidence had demonstrated the intent to torture and also the intent to kill the victim. In further contrast to People v. Pensinger, supra, 52 Cal.3d 1210, 1255, there was overwhelming evidence of intent to torture, as described above. In light of the various instructions and the entire trial record, we conclude there is no reasonable likelihood that the jury understood the torture-murder special-circumstance instruction as not requiring a finding of intent to torture. (People v. Mincey, supra, 2 Cal.4th 408, 455; see Estelle v. McGuire (1991) 502 U.S. __,__ [116 L.Ed.2d 385, 399, 112 S.Ct. 475, 482]; People v. Kelly (1992) 1 Cal.4th 495, 525.)

Defendant's claim that the evidence is insufficient to support the finding of a torture-murder special circumstance must be rejected. "Proof of a murder committed under the torture-murder special circumstance . . . requires proof of first degree murder (§ 190.2, subd. (a)), proof the defendant intended to kill and to torture the victim (§ 190.2, subd. (a)(18)), and the infliction of an extremely painful act upon a living victim. (Ibid.)" (People v. Davenport supra, 41

Cal.3d 247, 271.) Unlike the section 189 definition of murder by torture, section 190.2, subdivision (a)(18), requires that the defendant have acted with intent to kill. (41 Cal.3d at p. 271.)

As discussed in detail above, there was ample evidence to support the jury's finding of first degree murder, and to establish that defendant intended to torture his victim, did so while she still was alive, and intended to kill her.

2. Felony-murder special circumstances.

Defendant contends the trial court erred in failing to instruct the jury that in order to find the special circumstances charged under section 190.2, subdivision (a)(17)(iii) (rape) and (vii) (burglary), to be true, it had to determine that defendant possessed the intent to kill Mrs. Stendal. Subsequent to the trial in this case, such an instruction was required by this court's decision in Carlos v. Superior Court (1983) 35 Cal.3d 131, 142. Defendant also contends that even had the instructions correctly reflected the intent requirement, there is insufficient evidence to support findings of intent, and that these two special circumstance findings therefore must be set aside.

Defendant's claims are rendered moot by this court's intervening decision in People v. Anderson, supra, 43 Cal.3d 1104, 1147, which expressly overruled Carlos on this point. In Anderson, we held that "intent to kill is not an element of the felony-murder special circumstance; but when the defendant

is an aider and abettor rather than the actual killer, intent must be proved." (Ibid.) The rule enunciated in Anderson applies both to crimes committed after the Anderson decision and to crimes committed prior to the Carlos decision. (People v. Hamilton (1988) 46 Cal.3d 123, 143, fn. 5; People v. Easter (1987) 197 Cal.App.3d 183, 185-187; see People v. Ramirez (1990) 50 Cal.3d 1158, 1182-1183.) The offenses in this case were committed prior to Carlos.

In the present case, the evidence was susceptible of only two reasonable interpretations -- that defendant was the actual killer or that he was not at all involved in the crime; there was no evidence he participated only as an aider and abetter. Accordingly, intent to kill was not an element of the felony-murder special circumstances charged against defendant, and the trial court was not required to instruct on such intent as an element of the alleged special circumstances. (People v. Hamilton, supra, 46 Cal.3d 123, 142-143; People v. Easter, supra, 197 Cal.App.3d 183, 185.) Although the issue whether there was sufficient evidence to support a finding that defendant possessed the intent to kill therefore is moot in the context of defendant's present contention, we have concluded (as described above) that the evidence is sufficient to establish defendant's intent to kill.

In the present case, because defendant was guilty of murder in the perpetration of the rape, the rape-murder special circumstance properly was found to have been proved if

it was established that defendant intended to commit rape, and the rape and the killing were part of one continuous transaction. (See People v. Hayes, supra, 52 Cal.3d 577, 631-632; People v. Hernandez, supra, 47 Cal.3d 315, 348.) As is amply demonstrated by the evidence, a rational trier of fact could have found that defendant possessed the specific intent to commit rape, and that the rape was not merely incidental to the killing, but part of a continuous course of violence against the victim, culminating in her murder.

The same rule applies with regard to the finding of the burglary-murder special circumstance. (People v. Hayes, supra, 52 Cal.3d 577, 632; see People v. Hernandez, supra, 47 Cal.3d 315, 348.) A rational trier of fact properly could have found both that defendant intended to commit burglary, and that the burglary of the residence and the eventual killing were part of one continuous transaction. (See People v. Hayes, supra, 52 Cal.3d 577, 632.)

D. Jury deliberations.

1. Substitution of a juror.

The jury retired to deliberate at 3:40 p.m. on December 15, 1982, recessing for the day after less than one hour of deliberations. The following morning, before further deliberations, the court announced that one of the jurors had become ill, and both parties stipulated to his replacement by an alternate juror. After the alternate was sworn, the trial judge advised the jury to resume its deliberations, stating it

"would be helpful and in connection with commencing your deliberations again, that you kind of start, start from scratch, so to speak, so that Mr. Rhoades has the benefit of your thinking as well as give him an opportunity for his input also." The jury deliberated two and one-half days after substitution of the alternate juror before returning its verdict.

Defendant contends the court's admonition did not embody all elements of the instruction required by People v. Collins (1976) 17 Cal.3d 687. In Collins, this court directed that "the court instruct the jury to set aside and disregard all past deliberations and begin deliberating anew. The jury should be further advised that one of its members has been discharged and replaced with an alternate juror as provided by law; that the law grants to the People and to the defendant the right to a verdict reached only after full participation of the 12 jurors who ultimately return a verdict; that this right may only be assured if the jury begins deliberations again from the beginning; and that each remaining original juror must set aside and disregard the earlier deliberations as if they had not been had." (Id., at p. 694; see also People v. Anderson (1990) 52 Cal.3d 453, 482-483.)

Defendant's contention must be rejected. By instructing the jury to "kind of start, start from scratch, so to speak," the court implied that the jury should disregard its previous deliberations. (People v. Odle (1988) 45 Cal.3d

386, 405.) By providing this directive in the context of advising the jurors to give the alternate the benefit of the other jurors' thoughts, as well as to give the jurors the benefit of the alternate's input, the court further emphasized that deliberations were to begin anew with the full participation of the alternate. Furthermore, the court did not suggest that the jury might not have to reconsider any matter already considered or decided. (Compare People v. Odle, supra, 45 Cal.3d 386, 405 [court's comments erroneously implied that the alternate should be brought "up to speed" on matters already discussed and possibly decided].)

Finally, even assuming the court erred, no prejudice occurred. In determining whether Collins error was prejudicial, we may consider whether the case is a close one and compare the time the jury spent deliberating before and after the substitution of the alternate juror. (People v. Odle, supra, 45 Cal.3d 386, 405; Griesel v. Dart Industries, Inc. (1979) 23 Cal.3d 578, 585.) In People v. Odle, supra, 45 Cal.3d 386, we concluded there was no prejudice where the case against the defendant was overwhelming and where the jury deliberated only part of one afternoon prior to substitution of the alternate juror and two and one-half days thereafter. (Id., at p. 406.) In People v. Collins, supra, 17 Cal.3d 687, itself, we determined the error was not prejudicial where the case against the defendant was very strong, and the jury had deliberated little more than one hour prior to substitution of

the alternate and had returned a verdict after several additional hours. (Id., at pp. 690, 697.)

In the present case, the evidence against defendant was extremely strong. The jury had deliberated less than one hour prior to substitution of the alternate, and continued to deliberate for two and one-half days thereafter. It is not reasonably probable the outcome of the trial would have been different had the jury been instructed, in more exact language, to begin its deliberations anew. (See People v. Collins, supra, 17 Cal.3d 687, 697; People v. Watson (1956) 46 Cal.2d 818, 836.)

2. The trial court's comments on the jury's numerical division.

At 4 p.m. on Thursday, December 16, 1982, the first full day of deliberations, the jury conveyed a message to the court that the jury had reached an impasse and was requesting guidance as to how to proceed. The court, stating it had received the jury's message, requested that the jury foreman inform the court as to the numerical division of the jurors, without revealing the respective numbers for a guilty verdict or a not guilty verdict.6/

6/ The record of the exchange is as follows:
"THE COURT: All right, we have our jurors back in the box. Mr. Forrester, I received your message as to a numerical count. However, to properly appreciate your message, I'm going to have to ask you a few questions, all right?
"THE FOREMAN: Okay.
"THE COURT: Have the jurors voted on the first count, that would be the issue of murder?
"THE FOREMAN: Uh-huh.
"THE COURT: Without telling me which way that numeral [sic] count is, would you tell me what the numerical count
(Footnote continued on next page.)

Defendant contends the court's inquiry into the jury's numerical division impaired the fairness of the trial. "[T]he practice of inquiring into the jury's numerical division, without finding out how many are for conviction and how many for acquittal, was expressly approved in [People v.] Carter [(1968) 68 Cal.2d 810, 815]." (People v. Rodriguez (1986) 42 Cal.3d 730, 776.) Such inquiry is justified in the discharge of the court's "statutory responsibility of assuring that a verdict is rendered 'unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.' (Pen. Code, § 1140.)" (People v. Carter (1968) 68 Cal.2d 810, 815.)

Although, as defendant points out, the rule is otherwise in federal court (see Brasfield v. United States

(Footnote continued from previous page.)
is. Don't tell me which way, but what is the numerical count?
"THE FOREMAN: Eleven to one.
"THE COURT: Eleven to one. All right, now, have the jurors taken a vote on the Count II, the rape charge?
"THE FOREMAN: No, we haven't.
"THE COURT: Have the jurors taken a vote as yet on Count III, the burglary charge?
"THE FOREMAN: No, we haven't.
"THE COURT: All right, now in connection with the -- well, I think with that information presented to the Court that it would be of importance that if at the moment -- well, let me ask you this. Where do you think you are at the moment as far as the numerical count on the eleven to one on the first charge, the count of murder? Do you think that further consideration --
"THE FOREMAN: Yeah, we just -- we're kind of at a standstill."
At this point the court, indicating that it was not unusual in a case of this nature for jurors to deliberate longer than a single day, recessed the jury until the following day.

(1926) 272 U.S. 448 [71 L.Ed. 345, 47 S.Ct. 135]), we previously have explained that this federal rule is not binding on the states. (People v. Rodriguez, supra, 42 Cal.3d 730, 776, fn. 14.)7/ In view of the circumstance that the court inquired in a neutral manner as to the numerical count in order to determine whether further deliberations would be productive, we decline to disapprove the practice as it was employed in the present case.

We also disagree with defendant's contention that the court's order declaring a recess until the following morning, once it had ascertained the vote was split, implied the court had found "something wrong" with the vote which might be remedied by a night's rest. The determination, pursuant to section 1140, whether there is a "'reasonable probability'" of agreement, rests within the sound discretion of the trial court. (People v. Miller (1990) 50 Cal.3d 954, 994.) Although the court must take care to exercise its power without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency (ibid.), the court may direct further deliberations upon its reasonable conclusion that such direction would be perceived "'as a means of enabling the jurors to enhance their

7/ In his supplemental brief, defendant urges that we reconsider the California practice permitting such inquiry, but he also acknowledges we have rejected similar requests in other recent cases. (See, e.g., People v. Price (1991) 1 Cal.4th 324, 467; People v. Breaux (1991) 1 Cal.4th 281, 319.) We discern no reason, based upon the circumstances of the present case, to reconsider this issue.

understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered.' [Citation.]" (Ibid.) Nothing in the trial court's comment in the present case properly may be construed as an attempt to pressure the jury to reach a verdict; the court correctly concluded there was a reasonable probability the jurors could agree on a verdict.

3. The trial court's comments on defendant's testimony.

The jury continued its deliberations on Friday, December 17, 1982, at one point requesting that the instructions be reread. At 4:20 p.m. that day, the court was informed that one of the jurors sought to disqualify herself on the ground she was "the one," that is, the person not in agreement with the other eleven. After explaining that this circumstance afforded no basis for disqualification, the trial judge commented on the complexity of the case and the relatively brief period the jury had deliberated, reread the instruction as to defendant's entitlement to the individual opinion of each juror, and, noting the lateness of the hour, recessed the deliberations of the jury.

Prior to the resumption of jury deliberations on Monday morning, December 20, the court delivered the following comments:

"Ladies and gentlemen of the jury and the alternates, for the purpose of assisting you in deciding this

case, I am permitted by the Constitution of California to comment on the issues, the evidence and the testimony and credibility of any witness. And it occurred to me that before you retired to continue your deliberations this morning that some comment along those lines might be of some assistance to you.

"Now, you should keep in mind that my comments are intended to be advisory only, and are not binding on you, as you are the exclusive judges of the questions of fact submitted to you and of the credibility of the witnesses. You should disregard any or all of the comments, if you do not agree, if they do not agree with your views of the evidence and the credibility of the witnesses."

After outlining the difference between lawful and unlawful killing, the court stated there was no question in this case but that the killing of the victim was unlawful. The court then indicated the issues before the jury were whether the prosecution had proved beyond a reasonable doubt that defendant was legally responsible for the killing, and if so, in what degree, and if in the first degree, whether the prosecution had proved the special circumstances. The court also stated the jury must determine whether the prosecutor had proved the rape and burglary charges beyond a reasonable doubt.

The court continued: "Now, in that connection, there have been several statements attributed to the defendant out of court concerning his whereabouts and activities on the

night of April the 21st and the early morning hours of April the 22nd. These statements attributed to him are inconsistent with one another and are also inconsistent with his testimony here in court concerning his activities that evening and in the early morning hours of April the 22nd.

"Now, the district attorney has placed him in the house of Bonita Bergh Stendal through three palm prints; one bloody right palm print, which I think Mr. Collins testified to, was created by blood being on the palm first and then transferred to the booklet. In addition to that, Mr. Collins has testified there were two dry palm prints. By that, they were latent, there was a left palm print, which was latent, by that it had a chemical, had to be applied to one of the booklets to raise that palm print to where it could be seen. And another dry palm print of the right palm. Again, one that could only be seen after being treated with chemicals, and that was on a different booklet.

"Now, the defendant has testified and given you an explanation as to what he did in that house that morning which explains the presence of the bloody palm print, but does not explain the presence of the two dry or latent palm prints. Under those circumstances, I have difficulty in believing the testimony of the defendant. Now, again, my comments are intended to be advisory only and are not binding on you as you are the exclusive judges of the questions of fact submitted to you and of the credibility of the witnesses. You should

disregard any or all of the comments that I've made if they do not agree with your views of the evidence and the credibility of the witnesses."

The jury then commenced its deliberations for that day. After recessing for lunch and reconvening at 2:55 p.m., it informed the court it had reached a verdict. Prior to the seating of the jury, defendant's counsel stated he had an objection to the court's comments. The court admonished counsel that he should have made his objection earlier.

Defendant contends his right to due process of law was violated because he was not apprised in advance of the court's intention to comment, and that the content of the court's comments fell outside the range permitted by our decisions. We do not agree that defendant's right to due process of law was violated by the court's failure to provide advance notice of its intended comments. Although, as pointed out by defendant, the trial court was required by statute to afford advance notice of intended jury instructions, defendant has not directed our attention to any similar statutory or judicial requirement pertaining to judicial comment. In fact, because the statutory provision authorizing judicial comment is contained in the same section as that governing jury instructions (§ 1127; see § 1093, subd. (f)), and the Legislature while expressly providing that courts are to afford notice of jury instructions (§ 1093.5) has declined to impose such a requirement in the case of judicial comment, we

may presume no such requirement was intended by the Legislature as to the latter subject. Defendant relies primarily on People v. Rodriguez, supra, 42 Cal.3d 730, in which the trial court provided the parties with advance notice of its intended comments, and indeed, numerous drafts of the comments ultimately made in that case were prepared by the prosecutor and discussed at length by court and counsel in advance. (Id., at p. 774, fn. 13.) Although it would be better practice to afford counsel advance notice, we decline defendant's suggestion that we elevate our recitation of the particular procedural aspects of the Rodriguez case to the status of a legal requirement.

Next, defendant challenges the substance of the trial court's comments. Article VI, section 10, of the California Constitution permits the court to "make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause." (Italics added.) The purpose of this provision is to allow the court "to utilize its experience and training in analyzing evidence to assist the jury in reaching a just verdict. [Citations.]" (People v. Cook (1983) 33 Cal.3d 400, 407.) In People v. Rodriguez, supra, 42 Cal.3d 730, 765-770, we overruled that portion of People v. Cook, supra, 33 Cal.3d 400, 413, which held that a trial court may not make any comment on the evidence once the jury has announced it has reached an impasse in deliberations,

and concluded that although a trial court may not directly express an opinion on the ultimate issue of guilt or innocence of the accused at any stage of the trial, it is not prohibited from appropriate comment simply because the jury has indicated an initial deadlock in its deliberations. (People v. Rodriguez, supra, 42 Cal.3d at pp. 769-770; see People v. Melton (1988) 44 Cal.3d 713, 735.)

In generally summarizing the permissible contours of constitutionally authorized judicial comment, we observed in People v. Rodriguez, supra, 42 Cal.3d 730, that "the decisions admonish that judicial comment on the evidence must be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power. [Citations.]" (Id., at p. 766; People v. Gates (1987) 43 Cal.3d 1168, 1207.)

In People v. Rodriguez, supra, 42 Cal.3d 730, we also noted that a trial court has "broad latitude in fair commentary, so long as it does not effectively control the verdict. For example, it is settled that the court need not confine itself to neutral, bland, and colorless summaries, but may focus critically on particular evidence, expressing views about its persuasiveness. [Citations.]" (Id., at 768, italics added.) Therefore, the circumstance that in the

present case, the trial court chose to single out for particular emphasis the evidence concerning the presence of defendant's fingerprints at the crime scene, and defendant's inconsistent testimony, did not render its comments improper. As noted in Rodriguez, "'[A] judge may restrict his comments to portions of the evidence or to the credibility of a single witness and need not sum up all the testimony, both favorable and unfavorable. [Citations.]'" (Id., at p. 773, italics added.)

In the present case, the trial court essentially observed that defendant had made inconsistent statements concerning his whereabouts during the pertinent period, and that defendant's testimony as to his presence in the residence, while explaining the presence of the bloody palm print, did not explain the presence of the two dry or latent palm prints, causing the trial court to entertain doubts as to defendant's credibility. The trial court did not inaccurately state or distort any testimony (People v. Rodriguez, supra, 42 Cal.3d 730, 766, 769; People v. Cook, supra, 33 Cal.3d 400, 408), and its comment that defendant's testimony "explains the presence of the bloody palm print" permitted an inference more helpful to defendant than the jury might have drawn in the absence of the comment. Although the court commented upon defendant's credibility in a specific context, it did not comment on defendant's guilt or innocence, nor did it direct

that the jury reach a given verdict.[8/] Moreover, both prior to and after its comments, the court admonished the jury that it was free to disregard those comments. We conclude that the trial court's remarks fell within the scope of the constitutional privilege.

II. PENALTY-PHASE ISSUES

A. Alleged prosecutorial misconduct.

Defendant asserts the prosecutor committed misconduct in closing argument, when he stated the following: "[C]ircumstantial evidence is the best evidence in the world, if the circumstantial evidence is good enough. [¶] And in

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8/ The present case is clearly distinguishable from People v. Flores (1971) 17 Cal.App.3d 579, 588, in which the appellate court reversed the defendant's conviction for possession of heroin, based upon the trial court's comments on the evidence. In that case, the sole prosecution witness, a police officer, testified he saw the defendant throw away a packet of heroin, and the defendant testified he did not do so. Upon learning that the jury's vote was divided five to seven, the court told the jury that in its opinion it was a very simple, straightforward case, that the court perhaps had heard more evidence than the jury had because the court had "been in this business for some period of time," that it was really a question who was telling the truth, that if the jury believed the officer who testified he saw the defendant throw the packet of heroin away, it must believe the defendant guilty, that defendant's explanation of his behavior in the presence of the officer was not credible, that the defendant had a motive to lie whereas the officer did not, that the defendant had not provided any indication why the officer had a motive to lie, and that the trial court "would not have spent two minutes in deciding this case because I would have decided that the defendant was guilty." (Id. at p. 584, fn. 2, italics omitted.)

We believe the comments made by the trial court in the present case do not begin to approach this level of intervention in the jury's decisionmaking.

this case, of course, we've got the best circumstantial evidence you're ever going to get." Defendant objects to the designation of this evidence as the "best evidence in the world," but acknowledges the jury later was correctly instructed according to CALJIC No. 2.00 (1979 rev.) that: "Both direct evidence and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other." Any misapprehension on the part of the jury would have been corrected by this instruction. Furthermore, because defendant did not timely object or request an admonition, any error is deemed waived on appeal. (People v. Mitcham (1992) 1 Cal.4th 1027, 1077; People v. Hendricks (1988) 44 Cal.3d 635, 650.) Defendant's claim that the prosecutor's statement constituted an improper expression of his personal belief concerning this evidence must be rejected on the same ground.

Defendant next asserts the prosecutor's argument violated the rule in People v. Davenport, supra, 41 Cal.3d 247, 288-290, by representing that the absence of the following circumstances in mitigation constituted factors in aggravation under section 190.3: any mental or emotional disturbance on the part of defendant (factor (d)), the victim's participation in or consent to the homicidal act (factor (e)), and any circumstances causing defendant reasonably to believe in moral justification for his conduct (factor (f)). Although in Davenport we admonished that such

argument should not be permitted "in the future" (id., at p. 290), we nevertheless have applied the rule to cases tried, as was the present case, prior to Davenport. (People v. Beardslee (1991) 53 Cal.3d 68, 112.)

We observe, as we have in the past, that defendant's failure to object to the challenged remarks precludes a claim of prosecutorial misconduct. (People v. Visciotti (1992) 2 Cal.4th 1, 79; People v. Gallego (1990) 52 Cal.3d 115, 200; People v. Rodriguez, supra, 42 Cal.3d 730, 790.) Even assuming, as defendant has urged in his supplemental brief, that Davenport error served to exacerbate so-called "Brown" error (People v. Brown (1985) 40 Cal.3d 512 (revd. on other grounds in California v. Brown (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837]); see discussion, post), entitling defendant to review of his claim of error despite his failure to object (People v. Edelbacher (1989) 47 Cal.3d 983, 1035, fn. 16), there is no reasonable possibility the prosecutor's argument could have prejudiced the jury's sentencing decision. First, in view of the instructions on aggravating and mitigating factors described more fully below, there is no reasonable likelihood the jury would have been misled by the prosecutor's comments concerning the nature of the weighing process. (People v. Clair (1992) 2 Cal.4th 629, 662-663.) Second, the jury was instructed to consider the enumerated factors only "if applicable," allowing the jury to assign whatever weight was appropriate to each particular factor.

(People v. Gallego, supra, 52 Cal.3d 115, 200; People v. Brown (1988) 46 Cal.3d 432, 454-456.) In light of the nature of the aggravating evidence that properly was introduced, we conclude it is not reasonably possible that any mischaracterization by the prosecutor could have influenced the sentencing decision of a reasonable jury. (Id., at p. 456.)

Defendant also complains the prosecutor impermissibly offered as a factor in aggravation the nonstatutory ground that defendant showed "absolutely no remorse."[9/] Where a prosecutor does not suggest that a defendant's lack of remorse should be considered a factor in aggravation, he or she properly may comment on the lack of remorse. (People v. Gallego, supra, 52 Cal.3d 115, 197; People v. Carrera (1989) 49 Cal.3d 291, 339; see People v. Sully (1991) 53 Cal.3d 1195, 1249.)

The record discloses that defendant's objection to the prosecutor's remark was sustained. The trial court denied defense counsel's request for an additional curative instruction on the basis that the prosecutor had not claimed

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9/ The prosecutor's comment in context is as follows: "And let me suggest that in this case, there is no basis for sympathy for William Proctor. This is what he does on April 21st, 1982. That's what he does on April 21st. On April 22nd, what's he do? He shows absolutely no remorse." After the court sustained the defense objection, the prosecutor continued: "What does he do on the 22nd? He goes about his business like nothing happened. He goes to Redding. He goes with Bob Manley. And they go there for the purpose of having fun. [¶] The defendant spent April 22nd, 1982, having fun, less than twenty-four hours after he did that, and I submit there is no basis for sympathy for William Proctor in this case."

defendant's lack of remorse was a factor in aggravation, the court explaining it had sustained the objection because the statement constituted a conclusion.

We conclude the trial court was correct in ruling that the prosecutor had not cited lack of remorse as a factor in aggravation, although the court did err in sustaining the defense's objection that the prosecutor's statement expressed an impermissible conclusion. Thus, the trial court did not commit error in refusing defendant's request for an additional instruction or admonition.

Finally, defendant urges that the prosecutor committed prejudicial misconduct by erroneously claiming that the evidence of defendant's past demonstrated that he "is a violent person."[10/] Defendant's failure to object and request a curative instruction or admonition waives any claim he might have on appeal. (People v. Sully, supra, 53 Cal.3d 1195, 1248; People v. Rodriguez, supra, 42 Cal.3d 730, 790.)

Nonetheless, assuming defendant timely had objected, we reject defendant's claim on the merits. We conclude that

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10/ After canvassing the factors supporting imposition of the death penalty, the prosecutor commented: "Now, I submit that there is nothing that has been presented to you that would extenuate this crime. There is nothing about the defendant's background that you heard that would extenuate this crime. [¶] According to his aunt, he was a normal, average boy growing up, and his mother said that, essentially, as I recall. The only thing you know about his background is that he's had a little history of burglary, takes things that don't belong to him, and he is a violent person. That's what you know about his background. To me, that is not extenuating circumstances."

the prosecutor's remark was justifiable based on the extreme violence displayed by defendant in committing the present offenses. The prosecutor earlier had informed the jury that the circumstance of defendant's lack of any history of violence was a factor in mitigation. Although the prosecutor made the comment regarding defendant's being a violent person while discussing his background, it is apparent from the context of the entirety of the prosecutor's remarks that he was referring to defendant's conduct in the present case in characterizing defendant as a "violent person."

B. Instructional Error.

1. Instruction on aggravating and mitigating factors.

Defendant contends the court's instruction of the jury pursuant to former CALJIC No. 8.84.2 (4th ed. 1979 rev.)11/ violated his Eighth Amendment right under the

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11/ The court gave the 1979 revised version of former CALJIC No. 8.84.2, as follows: "[I]t is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed upon the defendant. [¶] After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. [¶] If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without possibility of parole. [¶] Before you may consider a particular aggravating circumstance to be true, you must be satisfied of the existence of that aggravating circumstance beyond a reasonable doubt."

federal Constitution to a constitutionally reliable determination of penalty, because the instruction may have confused the jury concerning the nature of the process of weighing aggravating and mitigating circumstances.

In People v. Brown, supra, 40 Cal.3d 512, we upheld the constitutionality of section 190.3, while acknowledging that an instruction incorporating the mandatory language of the section "might mislead jurors as to the scope of their sentencing discretion and responsibility." (People v. Bonin, supra, 46 Cal.3d 659, 706; People v. Hamilton (1988) 45 Cal.3d 351, 370.) We expressed concern that a jury reasonably might understand the language of the instruction to define the determination of penalty as "'simply a finding of facts'" or "'a mere mechanical counting of factors on each side of the imaginary "scale."'" (Ibid.) We also expressed concern that the jury reasonably might understand the instruction to require imposition of the death penalty if the factors in aggravation outweigh those in mitigation, even where that punishment does not appear appropriate in view of all the circumstances of the case. (People v. Hamilton, supra, 45 Cal.3d at pp. 370-371; People v. Brown, supra, 40 Cal.3d at pp. 540-544.) For those cases predating Brown (such as the

present case) in which the jury was instructed in the language of section 190.3, we advised we would review each appeal on its particular merits to determine whether the jury might have been misled to the defendant's prejudice. (People v. Hamilton, supra, 45 Cal.3d 351, 371; People v. Brown, supra, 40 Cal.3d at p. 544, fn. 17.)

In the present case, with regard to the first concern expressed in Brown, supra, 40 Cal.3d 512, we observe that the jury was instructed, according to defendant's request, as follows: "In considering, taking into account, and being guided by the aggravating and mitigating circumstances, you may not decide the effect of such circumstances by the simple process of counting the number of circumstances on each side. The particular weight of such opposing circumstances is not determined by the relative number, but rather by their relative convincing force on the ultimate question of punishment." Moreover, neither the prosecutor nor defense counsel suggested the jury simply should count the factors. (See People v. Webster (1991) 54 Cal.3d 411, 451-452; People v. Howard (1988) 44 Cal.3d 375, 435-436; People v. Myers (1987) 43 Cal.3d 250, 275.) Accordingly, we conclude the jury was not misled into mechanically counting the aggravating and mitigating factors.

With regard to the second concern described in Brown, supra, 40 Cal.3d 512, defendant asserts the jury was misled because, during voir dire, the prosecutor obtained assurances from the prospective jurors that they would not have difficulty in discharging their responsibility to impose the death penalty in the event the aggravating circumstances outweighed those in mitigation, and because, during closing argument, the prosecutor emphasized the language of section 190.3. After repeating the mandatory language of the statute, the prosecutor stated: "So if you conclude that the aggravating circumstances outweigh the mitigating circumstances, you are obligated to return a verdict of death. [¶] And we spent a considerable amount of time on voir dire on this issue, and you indicated that if that was the case, that would be your verdict." In concluding his argument, the prosecutor commented that the jury had "an important, awesome responsibility," and asked them to return a death verdict "not because you want to but because under the law of California it's necessary. Thank you."

In numerous cases we have found such remarks to be harmless. For example, we have concluded that a prosecutor's argument is not misleading simply because it restates the statutory language (e.g., People v. Hamilton (1989) 48 Cal.3d 1142, 1181), describes the statutory language as mandatory (e.g., People v. Adcox (1988) 47 Cal.3d 207, 267 [prosecutor emphasized the word "shall" and advised the jury that "you

haven't any choice"]; People v. Hendricks, supra, 44 Cal.3d 635, 653-655, 662 [prosecutor emphasized the word "shall," describing it as a "term of command" with a compulsory meaning, and the process as an "automatic" one]; People v. Allen (1986) 42 Cal.3d 1222, 1279 [prosecutor argued: "'. . . Shall, not may, not might, not maybe. It is very explicit. . . .'"]), or emphasizes that the jury's decision is dictated by the law. (E.g., People v. Burton (1989) 48 Cal.3d 843, 870; People v. Grant (1988) 45 Cal.3d 829, 857.)

Moreover, in concluding, the prosecutor emphasized that the jurors had an "important, awesome responsibility." (See People v. Burton, supra, 48 Cal.3d 843, 871.) This is not a case, such as People v. Milner (1988) 45 Cal.3d 227, in which the prosecutor "assured the jurors again and again that they did not have to 'shoulder the burden of personal responsibility,' told them again and again that the law 'protects' them from deciding what is 'just and right,' and even encouraged them to 'hide' behind the law." (Id., at p. 257; see People v. Burton, supra, 48 Cal.3d 843, 872.) Nor did the prosecutor admonish the jury that the law, rather than the jury, determined the issue whether the defendant should suffer life imprisonment or death. (Cf. People v. Farmer (1989) 47 Cal.3d 888, 928.) Furthermore, taken as a whole, the prosecutor's statements concerning the mandatory aspect of

section 190.3 were a minor part of his closing argument. (See People v. Kaurish (1990) 52 Cal.3d 648, 715.)

The instructions given in this case also implied that the jury's decision as to penalty was not to be automatic or mechanical. The jury twice was informed it had the duty to decide which of the two possible punishments should be imposed, was advised to consider the evidence, the arguments of counsel, and the aggravating and mitigating factors "if applicable," and was told that if a factor was not found to be mitigating, that circumstance did not render it an aggravating factor unless the jury determined it to be aggravating beyond a reasonable doubt. At defendant's request, the jury was instructed that it was obligated to weigh the sympathetic elements of defendant's background against those which might offend the conscience, and in so doing, it could consider pity, sympathy, and mercy for defendant, but that it could not be governed by conjecture, prejudice, or public opinion. The jury also was instructed that defendant and the prosecution were entitled to the individual opinion of each juror.

Finally, the comments of defense counsel underscored the jury's discretion to decide which penalty was appropriate under the circumstances: counsel advised the jurors that each of them had an independent, singular responsibility to determine the punishment, that it was not a democratic or community effort, and that each would have to live with the

verdict. Defense counsel told the jurors to consider and weigh the factors, as they felt appropriate. (See People v. Grant, supra, 45 Cal.3d 829, 856-857; People v. Williams (1988) 44 Cal.3d 1127, 1149.) Moreover, defense counsel stressed that the most important factor, a factor in mitigation, was the absence of any violence in defendant's past, thereby underscoring the jurors' duty to consider the factors individually.

From the arguments both of the prosecutor and defense counsel, and from the instructions, the jurors would have understood that they were required to determine the appropriate penalty for defendant by weighing the enumerated factors. (People v. Burton, supra, 48 Cal.3d 843, 873.) Viewing the instructions and arguments as a whole, we are satisfied there is no reasonable likelihood that the jury was misled as to the scope of its sentencing responsibility. (People v. Clair, supra, 2 Cal.4th 629, 662-663.)[12/]

2. Instruction on consideration of multiple special circumstances.

Defendant contends the trial court failed to give an instruction on multiple special circumstances as required by

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12/ In light of this conclusion, we need not, and do not, address the continuing validity of People v. Brown, supra, 40 Cal.3d 512, in light of the United States Supreme Court's decisions in Blystone v. Pennsylvania (1990) 494 U.S. 299, 108 L.Ed.2d 255, 110 S.Ct. 1078, and Boyde v. California (1990) 494 U.S. 370, 108 L.Ed.2d 316, 110 S.Ct. 1190. (People v. Webster, supra, 54 Cal.3d 411, 452, fn. 23; People v. Cooper, supra, 53 Cal.3d 771; 845, fn. 15; People v. Gonzalez (1990) 51 Cal.3d 1179, 1231, fn. 30.)

our decision in People v. Harris (1984) 36 Cal.3d 36. In Harris, the plurality opinion stated that in a case where "overlapping" special circumstances are found to be true, the risk arises that a jury may give undue weight to the mere number of special circumstances found true. "To avoid that risk, in those cases involving a single act or an indivisible course of conduct with one principal criminal objective, the jury should be instructed that although it found several special circumstances to be true, for purposes of determining the penalty to be imposed, the multiple special circumstances should be considered as one." (Id., at p. 66, plur. opn. by Broussard, J.)

A majority of this court subsequently held to the contrary in People v. Melton, supra, 44 Cal.3d 713, 765-768. In Melton we concluded that it is constitutionally legitimate for the state to determine that a death-eligible murderer is more culpable and thus more deserving of death, if, as in the Melton case, he not only robbed the victim but committed burglary in order to facilitate commission of the robbery and murder, because these offenses involve violations of distinct interests, each of which is relevant to a determination of the seriousness of the crime. (Id., at p. 767.) The decision in Melton has been applied in subsequent cases to reject similar claims based upon Harris. (E.g., People v. Mickey (1991) 54

Cal.3d 612, 691-692; People v. Sanders (1990) 51 Cal.3d 471, 529; People v. Hernandez, supra, 47 Cal.3d 315, 357-358.) Accordingly, we reject defendant's contention.

In his supplemental brief, defendant contends that Melton also requires that the jury receive instruction that the acts providing the bases for the special circumstances (rape and burglary) may not each be weighed more than once in the penalty determination, that is, both under the circumstances of the crime and as special circumstances (pursuant to section 190.3, factor (a), and the instruction patterned thereon). (People v. Melton, supra, 44 Cal.3d 713, 768.) Although defendant urges that the trial court has a sua sponte duty to so instruct, we have indicated only that upon defendant's request, such an instruction should be given. (People v. Ashmus (1991) 54 Cal.3d 932, 997; People v. Morris (1991) 53 Cal.3d 152, 224; People v. Melton, supra, 44 Cal.3d 713, 768.)

Moreover, we have observed that in the absence of any misleading argument by the prosecutor or an event demonstrating the substantial likelihood of "double-counting," reversal is not required. (People v. Morris, supra, 53 Cal.3d 152, 224; People v. Melton, supra, 44 Cal.3d 713, 768-769.) In the present case, the prosecutor did not suggest the offenses other than murder be considered dually as special circumstances and as acts making the murder more heinous; he simply underscored the facts showing the brutality of the acts.

C. Constitutionality of section 190.3, factor (a).

Defendant challenges the constitutionality of the portion of section 190.3 that provides: "In determining the penalty, the trier of fact shall take into account . . . [as] relevant: [¶] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true . . . ." Defendant contends the phrase, "the circumstances of the crime," is too vague to permit any meaningful distinction between those murders that warrant the death penalty and those that do not.

The United States Supreme Court itself has established that the circumstances surrounding a capital offense constitute one of the criteria upon which the jury should base its penalty determination. (See, e.g., Penry v. Lynaugh (1989) 492 U.S. 302, 318, 106 L.Ed.2d 256, 109 S.Ct. 2934; Booth v. Maryland (1987) 482 U.S. 496, 502, 96 L.Ed.2d 440, 107 S.Ct. 2529, overruled on other grounds in Payne v. Tennessee (1991) __ U.S. __, 115 L.Ed.2d 720, 111 S.Ct. 2597; Jurek v. Texas (1976) 428 U.S. 262, 304, 49 L.Ed.2d 944, 96 S.Ct. 2950 (plur. opn.). The high court has not stated or implied that the factor of the "circumstances of the offense" is unconstitutionally vague.

Defendant also contends section 190.3 is unconstitutional as applied to him because, unlike the typical

case where the same jury decides both issues of guilt and penalty, his case afforded the jurors only one opportunity to express their outrage at the offenses -- by assigning the degree of punishment -- and therefore the jury was more prone to set the maximum penalty. Nothing in the evidence, the arguments of counsel, or the instructions supports this assertion. Furthermore, because it was defendant who requested the change of venue and, by definition, the new jury, he is not in a position to claim prejudice from the granting of his motion. We also note that defendant has provided no authority for the proposition that, when a new penalty jury has been impaneled, the state may not permit the jury to determine the appropriate punishment on the basis of the same criteria that would have applied had a single jury determined both issues of guilt and penalty. Defendant has not provided any basis for us to conclude section 190.3 is unconstitutional.

D. Denial of the automatic application for modification of the verdict.

Defendant contends the court erred in denying the automatic motion to modify the verdict pursuant to section 190.4, subdivision (e). Under that section, the trial judge's "function is not to make an independent and de novo penalty determination, but rather to independently reweigh the evidence of aggravating and mitigating circumstances and then to determine whether, in the judge's independent judgment, the weight of the evidence supports the jury's verdict.

[Citations.]" (People v. Lang (1989) 49 Cal.3d 991, 1045, italics in original; People v. Edwards, supra, 54 Cal.3d 787, 846.) The trial judge must set forth his or her reasons with sufficient particularity to allow effective appellate review. (54 Cal.3d at p. 846; People v. Kelly (1990) 51 Cal.3d 931, 970.)

1. The circumstances of the crime.

Relying upon People v. Rodriguez, supra, 42 Cal.3d 730, defendant contends the trial court did not adequately specify its reasons for determining that section 190.3, factor (a) (the circumstances of the crime), amounted to an aggravating factor. In that case, we held the court's statement of reasons for denying the motion, as a whole, was insufficient "to assure thoughtful and effective appellate review," where the trial court simply stated that, having considered the arguments of counsel, all the evidence, and all the aggravating and mitigating circumstances, the aggravating factors outweighed those in mitigation and the weight of the evidence supported the jury's verdict of death. (At pp. 792-794.)

In the present case, the trial court's comments, in considering the section 190.3 factors generally and factor (a) in particular, were far more extensive and detailed. In explaining its ruling denying the automatic motion, the court commented that it had reviewed the evidence, considered the aggravating and mitigating factors, and made a determination

whether the jury's verdict (that the aggravating circumstances outweighed the mitigating circumstances) was contrary to law or to the evidence. Following defense counsel's argument that the offenses committed in the present case were not sufficiently grievous to justify the death penalty, the court stated it had examined and carefully reviewed the testimony presented and had found that the jury's verdict was supported by the weight of the evidence and that defendant was guilty beyond a reasonable doubt.

The court then considered each section 190.3 factor in turn, devoting the greatest amount of time to factor (a), the circumstances of the crime. The court summarized the evidence, emphasizing that the telephone lines in the kitchen and the den had been cut, and that the victim had been raped, beaten, stabbed, and intentionally tortured by defendant. The court described in detail the condition of the body and recounted the expert testimony concerning the nature of the victim's injuries and defendant's purpose in inflicting them. The court also noted that defendant had transported the victim's body to another location.

The trial court's discourse on section 190.3, factor (a), was sufficiently detailed and thorough to justify the determination made by the court. It is readily apparent the court provided far more elaboration than did the trial court in Rodriguez, supra, 42 Cal.3d 730, and defendant does not indicate what additional elements he believes the court should

have considered in deciding whether the circumstances of the capital offense constituted a factor in aggravation. We conclude the court adequately stated its reasons for determining that the circumstances of the crime constituted an aggravating factor.

2. Defendant's role in the crime.

Section 190.3, factor (j), specifies that among the matters to be considered by the trier of fact in determining the penalty is "[w]hether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor." Defendant contends that, because the evidence merely established the inapplicability of factor (j), it was improper for the trial court to consider, as a factor in aggravation, the circumstance that defendant acted alone.

We have indicated or implied in numerous prior decisions that factor (j) may be considered only as a mitigating factor, and that where the defendant is not an accomplice whose participation in the offense is relatively minor, the factor is simply inapplicable and should not be considered as aggravating. (People v. Daniels, supra, 52 Cal.3d 815, 889; People v. Gallego, supra, 52 Cal.3d 115, 200; People v. Gonzalez, supra, 51 Cal.3d 1179, 1233-1234; People v. Hamilton, supra, 48 Cal.3d 1142, 1184; People v. Burton,

supra, 48 Cal.3d 843, 865; People v. Walker (1988) 47 Cal.3d 605, 643-644; People v. Hernandez, supra, 47 Cal.3d 315, 363-364; People v. Adcox, supra, 47 Cal.3d 207, 273; People v. Moore (1988) 47 Cal.3d 63, 92 & fn. 13; People v. Karis (1988) 46 Cal.3d 612, 652; People v. Brown, supra, 46 Cal.3d 432, 455-456 & fn. 10; People v. Siripongs (1988) 45 Cal.3d 548, 582-583; see People v. Davenport, supra, 41 Cal.3d 247, 288-290.) Nonetheless, in People v. Howard, supra, 1 Cal.4th 1132, 1195, we approved the trial court's treatment of evidence of that defendant's sole participation as aggravating under factor (j). We need not decide the issue raised by the apparent conflict among these decisions, because any error in the present case would not have been prejudicial.

The People indicate that the failing, if any, in the trial court's consideration (under section 190.3, factor (j)) of the evidence that defendant had acted alone, consists in the court's already having considered defendant's singular and active role in the offense when the court reviewed the circumstances of the offense under section 190.3, factor (a). In his reply brief, defendant contends that the trial court did, in fact, err in this regard.

Our review of the record reveals, however, that at no time during the court's discourse on the circumstances of the offense did it emphasize, or even mention, that defendant had acted alone. That the court reviewed defendant's

commission of the offense (and the nature of that offense) does not lead to the conclusion that the court considered defendant's exclusive participation in the acts as a circumstance in aggravation under section 190.3, factor (a). Aside from the court's consideration, under section 190.3, factor (j), of defendant's role in the offense, the only other reference by the court to the circumstance that defendant acted alone was made in the context of its review of section 190.3, factor (g), addressing whether defendant had acted under extreme duress or under the domination of another person. In the latter part of its review, the court simply noted that, because defendant had acted alone, factor (g) was inapplicable. The court did not consider twice the evidence that defendant had acted alone in conceiving and carrying out the offense, and therefore, any error in considering this circumstance under factor (j) was harmless. (People v. Burton, supra, 48 Cal.3d 843, 865; People v. Adcox, supra, 47 Cal.3d 207, 273.)

3. Defendant's age and prior felony convictions.

Defendant next asserts the trial court erred in determining that, although defendant's age (twenty years, three and one-half months at the time of the offense) "could be a mitigating factor," the circumstances that defendant had been convicted of three prior felonies, had violated probation in March 1981, and was on parole at the time he committed the

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present offense, rendered defendant's age neither a mitigating nor an aggravating factor.

Depending upon the circumstances of the crime, age properly can be considered either as a mitigating or an aggravating factor. (People v. Mitcham, supra, 1 Cal.4th 1027, 1076; People v. Edwards, supra, 54 Cal.3d 787, 844.) It functions "'as a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty.'" (People v. Mitcham, supra, 1 Cal.4th 1027, 1076.)

Therefore, in the present case the trial court was not obligated to treat defendant's age as a factor in mitigation. Moreover, we believe that although the court expressed itself somewhat imprecisely, in essence it weighed the two factors of defendant's age and his prior felony convictions in concluding, in light of defendant's prior record, that the circumstance that he was between 20 and 21 years of age at the time he committed the present offense was not entitled to much weight. The court properly weighed these factors in assessing whether the penalty was appropriate. (See, e.g., People v. Hamilton, supra, 48 Cal.3d at pp. 1186-1187.)13/

13/ Because the trial court did not consider any "invalid aggravating factor" (including any aggravating factor not supported by substantial evidence) in denying the motion under section 190.4, subdivision (e), Sochor v. Florida (1992) ___ U.S. ___, ___ [119 L.Ed.2d 326, 112 S.Ct. 2114, 2120-2123], cited in defendant's supplemental brief, has no application to the present case.

4. Consideration of other extenuating circumstances.

Defendant contends that the court inadequately stated its reasons for concluding no mitigating circumstances were present under section 190.3, factor (k),14/ and that the court's statement did not indicate it had assessed the credibility of the witnesses, determined the probative force of the testimony, and weighed the evidence.

As described above, the court reiterated that it had evaluated all the evidence and expressly considered the evidence or absence of evidence relating to each successive factor, examining carefully the evidence in mitigation. After expressing its views as to the applicability of section 190.3, factor (k), the court stated: "As required by law, the Court has considered all the evidence adduced at the penalty phase of the trial and has been guided by the aforesaid factors, and

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14/ The court stated: "[T]he final factor is, quote, any other circumstances which extenuate the gravity of the crime, even though it is not a legal excuse for the crime, including but not limited to the defendant's character, background, history, mental condition and physical condition, end quote. [¶] The evidence adduced at the penalty phase of the trial causes the court to find that there are no circumstances which extenuate the gravity of the crimes which you committed and for which you have been convicted. Therefore, the Court finds that this factor constitutes neither a mitigating nor an aggravating factor."

4. Consideration of other extenuating circumstances.

Defendant contends that the court inadequately stated its reasons for concluding no mitigating circumstances were present under section 190.3, factor (k),[14] and that the court's statement did not indicate it had assessed the credibility of the witnesses, determined the probative force of the testimony, and weighed the evidence.

As described above, the court reiterated that it had evaluated all the evidence and expressly considered the evidence or absence of evidence relating to each successive factor, examining carefully the evidence in mitigation. After expressing its views as to the applicability of section 190.3, factor (k), the court stated: "As required by law, the Court has considered all the evidence adduced at the penalty phase of the trial and has been guided by the aforesaid factors, and

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instances in which the trial court reiterated that it independently had reviewed the evidence, and the particularity with which the court reviewed the evidence, we conclude the court properly understood and performed the obligation imposed upon it by section 190.4, subdivision (e).

III. CONCLUSION

The judgment is affirmed in its entirety.

GEORGE, J.

WE CONCUR:

LUCAS, C.J.
PANELLI, J.
ARABIAN, J.
BAXTER, J.

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PEOPLE v. PROCTOR

S004555 [Crim.23185]

CONCURRING AND DISSENTING OPINION BY KENNARD, J.

I concur in the judgment. I write separately to emphasize that the authority of trial courts to comment on the evidence is subject to strict limitations and must be exercised with extreme caution, and to express my view that, consistent with this court's well-established case law, factor (j) of Penal Code section 190.3 cannot be an aggravating circumstance.

I.

Our Constitution (Cal. Const., art. VI, § 10), as well as our statutes (Pen. Code, §§ 1093, subd. (f), 1127), grant trial courts the authority to comment on the testimony and credibility of witnesses. But there is a countervailing consideration. The Constitutions of both the United States (U.S. Const., Amend. VI) and the State of California (Cal. Const., art. I, § 16) also grant a criminal defendant the right to a jury trial, and that right requires that the jury be the exclusive arbiter of questions of fact and the credibility of witnesses. (See e.g., People v. Rodriguez (1986) 42 Cal.3d 730, 766; People v. Friend (1958) 50 Cal.2d 570, 577-578; People v. Ottey (1936) 5 Cal.2d 714, 728.)

There is an inherent tension between the authority of a trial court to comment on the evidence and the right of a criminal defendant to a jury trial. A court's exercise of its authority to comment on the evidence always poses the danger of a violation of the right to jury trial. Because a judge presiding over a trial necessarily has substantial influence on the jury (Bollenbach v. United States (1946) 326 U.S. 607, 612), every judicial comment on the evidence carries with it an appreciable risk that the jury may discount its own view of the evidence in deference to the judge's opinion. (People v. Cook (1983) 33 Cal.3d 400, 407.) Therefore, in the interest of protecting the right to jury trial while giving efficacy to our state Constitution's grant of authority to comment on the evidence, appellate courts have imposed strict limitations on the trial court's authority to comment.

Thus, a trial court's comments on the evidence must be "necessary for a proper determination of the cause." (Cal. Const., art. VI, § 10.) They must assist, not coerce, the jury. (People v. Rodriguez, supra, 42 Cal.3d at pp. 767-768.) The court must inform the jurors that they are the exclusive judges of all questions of fact and of the credibility of witnesses. (Pen. Code, § 1127; People v. Brock (1967) 66 Cal.2d 645, 651.) The comments must be made with a view to protecting the rights of the defendant. (People v. Brock, supra, 66 Cal.2d at p. 650.) They must be accurate, temperate, scrupulously fair, and made with wisdom and restraint. (People v. Cook, supra, 33 Cal.3d at p. 408.) The comments may not (1) be argumentative (ibid.); (2) distort the law or the record (People v. Brock, supra, 66 Cal.2d at p. 650; People v. Friend, supra, 50 Cal.2d at p. 577); (3) withdraw evidence from the jury's consideration (People v. Brock, supra, at p. 650); (4) expressly or impliedly direct a verdict (People v. Cook, supra, 33 Cal.3d at p. 408; People v. Brock, supra, 66 Cal.2d at p. 650); or (5) express a view on the ultimate issue of guilt or innocence (People v. Melton (1988) 44 Cal.3d 713, 735).

In this case, the trial court's comments came perilously close, but did not cross, the line between permissible jury assistance and prohibited coercion. The court made its remarks without notice to counsel and after it was aware that the jury had deadlocked 11 to 1. The comments, however, were accurate and did not distort the record. Immediately before and after the comments, the court reminded the jury that it was the exclusive arbiter of questions of fact and the credibility of the witnesses, and that it was free to disregard any or all of the trial court's comments. The jury then continued its deliberations for approximately four hours. (Compare People v. Cook, supra, 33 Cal.3d at p. 406 [jury returned verdict fourteen minutes after trial court's comments].)

the commission of the offense was relatively minor" in deciding whether to impose the death penalty. Thus, if the defendant is an accomplice whose role in the offense was relatively minor, the jurors must consider this fact as a circumstance in mitigation, although they are free to give it whatever weight they deem appropriate. If these conditions are not satisfied, factor (j) is inapplicable, as the defendant's conduct in this regard is not "more serious than 'normal'" for a person who has been convicted of murder with special circumstances. (People v. Daniels (1991) 52 Cal.3d 815, 889; People v. Burton (1989) 48 Cal.3d 843, 864-865; People v. Adcox (1988) 47 Cal.3d 207, 273; People v. Siripongs (1988) 45 Cal.3d 548, 583; see also People v. Davenport (1985) 41 Cal.3d 247, 289-290.)

When, as here, the defendant is the sole perpetrator of the murder, factor (j) does not apply, as this court has held on numerous occasions. (People v. Daniels, supra, 52 Cal.3d at p. 889; People v. Hamilton (1989) 48 Cal.3d 1142, 1184; People v. Hernandez (1988) 47 Cal.3d 315, 364; People v. Karis (1988) 46 Cal.3d 612, 652; People v. Brown (1988) 46 Cal.3d 432, 455-456 & fn. 10; People v. Siripongs, supra, 45 Cal.3d at p. 583; see also People v. Gallego (1990) 52 Cal.3d 115, 200; People v. Gonzales (1990) 51 Cal.3d 1179, 1233-1234; People v. Burton, supra, 48 Cal.3d at pp. 864-865; People v. Adcox, supra, 47

Cal.3d at p. 273; People v. Walker (1988) 47 Cal.3d 605, 643-644; People v. Moore (1988) 47 Cal.3d 63, 92 & fn. 13.)

The majority puts in doubt the continuing validity of all these cases by asserting that they are now in "apparent conflict" with People v. Howard (1992) 1 Cal.4th 1132, 1195. But the opinion in Howard provided no reasoning or analysis to support the one sentence in that opinion that is arguably inconsistent with this otherwise unbroken line of authority, nor did it discuss or even acknowledge any of the contrary decisions listed above. The suggestion in Howard that factor (j) can be aggravating carries no persuasive force and should therefore be disapproved.

In People v. Hernandez, supra, 47 Cal.3d 315, 364, this court said that because the defendant in that case was the sole perpetrator of the murders, factor (j) "obviously did not apply . . . ." What was obvious to a unanimous court in Hernandez has become obscure to the current majority, and for no good reason. The mandate of this court is to settle important questions of law (Cal. Rules of Court, rule 29(a)), not to unsettle them. I decline to join the majority in unsettling the proper meaning and scope of factor (j).

KENNARD, J.

PEOPLE v. WILLIAM ARNOLD PROCTOR

S004555

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TRIAL COURT #: 65383

The information provided here is not intended to reflect that which will appear in official reports.

C O P Y

PEOPLE v. PROCTOR

S004555 [Crim. 23185]

DISSENTING OPINION BY MOSK, J.

I dissent.

In my view, the court committed reversible error by commenting as it did on the evidence and defendant's credibility.

I

Trial on the question of guilt or innocence was conducted in late 1982 in rural Shasta County. It was charged that, on April 21 or 22 of that year, defendant burglarized the residence of Bonita Bergh Stendal in the small mountain community of Burney and there proceeded to rape and murder the woman; it was alleged that he intentionally inflicted great bodily injury on Stendal in the course of the burglary and the rape, and that he murdered her under the special circumstances of felony-murder-burglary, felony-murder-rape, and torture murder.

Between December 8 and 14, the People presented evidence to establish defendant's guilt. Included were three palm prints at Stendal's residence: a bloody and visible

print from defendant's right hand, and two dry and latent prints, one from his right hand, the other from his left. Also offered were various extrajudicial statements he had made relating to his activities and whereabouts on April 21 and 22.

On December 14, defendant presented evidence. He took the stand to deny involvement in the crimes and to attempt to explain his palm prints and extrajudicial statements. He sought to exculpate himself and to inculpate his friend Robert Manley.

On December 15, the prosecutor and defense counsel delivered their summations. The prosecutor's position was, of course, that defendant was guilty. He argued, in part, as follows: Stendal had been murdered; someone was obviously responsible; that someone was defendant; his palm prints placed him in the Stendal residence; true, he gave exculpatory testimony about his activities and whereabouts on April 21 and 22, within the house and without; his statements on the stand, however, did not explain the palm prints and were inconsistent with his statements out of court, which in turn were inconsistent with each other; as a result, his exculpatory testimony lacked credibility. Defense counsel's position was to the contrary. His argument included an attempt to counter practically all the prosecutor's points.

Also on December 15, the jury was instructed on the murder, rape, and burglary charges and the special

circumstance and great-bodily-injury allegations. The panel then commenced its deliberations and spent less than an hour at the task. The court recessed the proceedings for the day.

On December 16, at morning's opening, the court effectively instructed the jury to begin its deliberations anew after it substituted an alternate juror in place of one of the original members, whom as it stated it had discharged on stipulation because of a sudden illness. The panel deliberated about four and one-quarter hours. The foreman then reported to the court that the jurors were at an impasse and requested direction on how to proceed. The court asked whether the panel had voted on murder. The foreman said yes. The court asked for the numerical count without disclosure of the position as to guilt or innocence. The foreman said 11 to 1. The court asked whether the panel had voted on rape. The foreman said no. The court posed the same question about burglary. The foreman gave the same answer. The court then informed the jurors that they faced a situation that was not unusual, and might need more time to make their determinations. It recessed the proceedings for the day.

On December 17, the jury deliberated about two and one-half or three and one-half hours. At the foreman's request, the court reread the instructions to the panel. The jury deliberated about one and one-half hours more.

Late that afternoon, the foreman sent the court a note that Juror Mae Lois Turner -- who was evidently the only Black person on the panel -- "would like to disqualify self. Would like to be replaced by alternate."

In open court, in the presence of the other members of the panel, Juror Turner confirmed the report. The court asked, "Why is it you wish to disqualify yourself?" She answered, "Because I'm the one," "I'm the one who is -- there is eleven to one. I'm the one." The court stated, "That would not be -- that's not justification for disqualification. If you have some problem -- " She interjected, "I don't have any problem, Judge," and explained, "I have my opinion and I don't want to be -- I don't want to be pressured into doing something, and they have their opinion, and I have mine." The court responded, "Well, that's fine. There is no problem with that, so long as you're discussing the evidence." One of the jurors remarked, "Everybody is getting tired with one another."

Addressing all the jurors, the court stated that the case was complicated and relatively little time had been spent in deliberations. It reread the instruction that both the People and defendant were entitled to the individual opinion of each juror. It also reminded the jurors that they were under a duty to proceed conscientiously, and expressed its belief that they were doing so. It then noted the

lateness of the hour. It determined that the panel had not voted on any of the charges or allegations other than murder. It recessed the proceedings until December 20.

On December 20, without notice to the People or defendant and before deliberations resumed, the court made a comment to the jurors and alternate jurors concerning the evidence and defendant's credibility. It opened with a statement that its words were intended to be "advisory only" and were "not binding." It then proceeded: there was no question that the killing of Stendal was murder; rather, the basic question was whether defendant was the murderer; his palm prints placed him in the Stendal residence; true, he gave exculpatory testimony about his activities and whereabouts on April 21 and 22, within the house and without; his statements on the stand, however, did not explain the palm prints and were inconsistent with his statements out of court, which in turn were inconsistent with each other; as a result, his exculpatory testimony lacked credibility. It closed by repeating its statement that its words were intended to be "advisory only" and were "not binding."[1/]

1/ "Ladies and gentlemen of the jury and the alternates, for the purpose of assisting you in deciding this case, I am permitted by the [C]onstitution of California to comment on the issues, the evidence and the testimony and credibility of any witness. And it occurred to me that before you retired to continue your deliberations this morning that some comment along those lines might be of some assistance to you.

"Now, you should keep in mind that my comments are intended to be advisory only, and are not binding on you, as
(Footnote continued on next page.)

The jury then deliberated about three and one-half or four and one-half hours. It returned guilty verdicts on each of the charges and true findings on each of the allegations.

(Footnote continued from previous page.)
you are the exclusive judges of the questions of fact submitted to you and of the credibility of the witnesses. You should disregard any or all of the comments, if you do not agree, if they do not agree with your views of the evidence and the credibility of the witnesses.

"Now, under California law, by definition, the word 'homicide' means the killing of one human being by another, either lawfully or unlawfully. Now, under the instructions that I've given you, the word homicide includes murder. And I've given you in that connection instructions on first degree murder as well as instructions on second degree murder. There is the word homicide, however, also means the lawful killing of another -- of a person by another. And that's in situations where the act occurs as a result of some excusable or justifiable -- under the law -- reason for killing. In this particular case, we do not have a justifiable or lawful killing of a human being by another. There shouldn't be any doubt in anyone's mind that the death, the killing of Bonita Bergh Stendal was an unlawful killing of her by another person. There is absolutely no evidence whatsoever that she was killed in self defense or any other type of reason or that she killed herself. There shouldn't be any doubt in anyone's mind on the facts that have been presented in this case, that we have an unlawful killing of Ms. Stendal by another person.

"Now, the real question in this case is whether the State, the district attorney, has proved beyond a reasonable doubt that the defendant is legally responsible for the killing. That's basically the issue here, as well as if the State has proved beyond a reasonable doubt that the defendant is legally responsible for the killing, have they proved beyond a reasonable doubt that it's murder in the first degree or murder in the second degree. And if they've proved beyond a reasonable doubt that it's murder in the first degree, you go on to whether they proved beyond a reasonable doubt any one or more of the special circumstances that have been mentioned. And you are also called upon to determine as to whether they've proved beyond a reasonable doubt that the defendant committed the rape, whether they proved beyond a reasonable doubt the defendant committed a burglary.

"Now, in that connection, there have been several statements attributed to the defendant out of court concerning his whereabouts and activities on the night of
(Footnote continued on next page.)

II

Article VI, section 10 of the California Constitution (hereafter article VI, section 10) declares in relevant part that "The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause."

(Footnote continued from previous page.)
April the 21st and the early morning hours of April the 22nd. These statements attributed to him are inconsistent with one another and are also inconsistent with his testimony here in court concerning his activities that evening and in the early morning hours of April the 22nd.

"Now, the district attorney has placed him in the house of Bonita Bergh Stendal through three palm prints; one bloody right palm print . . . was created by blood being on the palm first and then transferred . . . . In addition to that, . . . there were two dry palm prints. By that, they were latent, there was a left palm print, which was latent . . . . And another dry palm print of the right palm. . . .

"Now, the defendant has testified and given you an explanation as to what he did in that house that morning which explains the presence of the bloody palm print, but does not explain the presence of the two dry or latent palm prints. Under those circumstances, I have difficulty in believing the testimony of the defendant. Now, again, my comments are intended to be advisory only and are not binding on you as you are the exclusive judges of the questions of fact submitted to you and of the credibility of the witnesses. You should disregard any or all of the comments that I've made if they do not agree with your views of the evidence and the credibility of the witnesses."

The purpose of the provision is to allow the trial judge to use his "training in analyzing testimony" and "experience in determining the credibility of witnesses" "to assist the jurors in determining what evidence has a bearing on the disputed issues in the case and to aid them in weighing the evidence . . . ." (People v. Brock (1967) 66 Cal.2d 645, 650, "overruled" on a point not implicated herein, People v. Cook (1983) 33 Cal.3d 400, 413, fn. 13, overruled in turn on a point not implicated herein, People v. Rodriguez (1986) 42 Cal.3d 730, 770.)

The provision, of course, is subject to the criminal defendant's right to trial by jury under both the United States and California Constitutions. The Sixth Amendment to the federal charter, as made applicable to the states by the due process clause of the Fourteenth Amendment, declares that "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial[] by an impartial jury . . . ." Article I, section 16 of the state charter provides that "Trial by jury is an inviolate right and shall be secured to all . . . ."

Under article VI, section 10, a court has broad power in delivering a comment. (E.g., People v. Rodriguez, supra, 42 Cal.3d at p. 766.) But that power is not unlimited. (E.g., People v. Brock, supra, 66 Cal.2d at p. 650.) As noted, the constitutional authority has been

given to judges for the purpose of assisting jurors. A judge must, of course, cleave fast to the judicial role and not adopt that of an advocate. (See, e.g., People v. Friend (1958) 50 Cal.2d 570, 577 [construing former § 19 of art. VI of Cal. Const., which was the predecessor of present § 10 of art. VI of Cal. Const., and was virtually identical in relevant part thereto], "overruled" on a point not implicated herein, People v. Cook, supra, 33 Cal.3d at p. 413, fn. 13.) Also, any remarks he may make must further, and not frustrate, the defendant's "right to independent jury determination of the facts bearing on his guilt or innocence." (People v. Rodriguez, supra, at p. 766.) Accordingly, he may not state or suggest his own views on guilt or innocence. (People v. Cook, supra, at pp. 412-413; see People v. Rodriguez, supra, at p. 770.) To do so would "necessarily interfere[] with the jurors' ability to freely perform their fact-finding responsibility." (People v. Cook, supra, at p. 413.)

Not only is the court's power to comment broad, it is also "most potent." (People v. Robinson (1946) 73 Cal.App.2d 233, 237 [construing former § 19 of art. VI of Cal. Const.].) "'The influence of the trial judge on the jury is necessarily and properly of great weight,' [citation], and jurors are ever watchful of the words that fall from him." (Bollenbach v. United States (1946) 326 U.S. 607,

612.) "The point need not be labored that the members of the jury are apt to give great weight to any hint from the judge as to his opinion on the weight of the evidence or the credibility of the witnesses . . . ." (People v. Robinson, supra, at p. 237.) Accordingly, the court must exercise its power "with great care" (People v. Rincon-Pineda (1975) 14 Cal.3d 864, 886) and "with wisdom and restraint" (People v. Shannon (1968) 260 Cal.App.2d 320, 331), "lest [it invade] the province of the jury as trier of fact" (People v. Rincon-Pineda, supra, at p. 886) or indeed "control the verdicts" (People v. Brock, supra, 66 Cal.2d at p. 650).

It follows that, even if it proceeds ever so cautiously, a court passes beyond the bounds of what is permitted under article VI, section 10 when its comment "hinders rather than helps the jury to perform its duty in properly considering the case." (People v. Oliver (1975) 46 Cal.App.3d 747, 753.) Such a situation is present, for example, where the remark "provides for the jury a means to avoid the preliminary determinations called for by the instructions on the law and instead to rely on the words of the judge in returning a conviction." (People v. Brock, supra, 66 Cal.2d at p. 651.) A court also exceeds the permissible by making what is "tantamount to an argument to convict" (People v. Flores (1971) 17 Cal.App.3d 579, 588) and -- a fortiori -- by stating or suggesting its own views on

guilt or innocence (People v. Cook, supra, 33 Cal.3d at pp. 412-413).

III

Applying the foregoing principles to the facts of record, I conclude that the court committed reversible error by commenting as it did on the evidence and defendant's credibility.

Error is manifest.

To begin with, the court did not proceed "with great care" (People v. Rincon-Pineda, supra, 14 Cal.3d at p. 886) or "with wisdom and restraint" (People v. Shannon, supra, 260 Cal.App.2d at p. 331). Indeed, its intervention was altogether precipitous. Almost three full days had passed since the jury had last deliberated. Comment was premature before the jurors had returned to their task and expressed some difficulty. It was also imprudent without notice to the People and defendant.

More troubling, the court's comment was "tantamount to an argument to convict" (People v. Flores, supra, 17 Cal.App.3d at p. 588) and indeed suggested that the court itself believed defendant was guilty, and could only have "hinder[ed] rather than help[ed] the jury to perform its duty in properly considering the case" (People v. Oliver, supra, 46 Cal.App.3d at p. 753).

Recall that part of the prosecutor's summation and the substance of the court's comment were to the same effect: Stendal had been murdered; defendant's palm prints placed him in her residence; true, he gave exculpatory testimony about his activities and whereabouts on April 21 and 22, within the house and without; his statements on the stand, however, did not explain the palm prints and were inconsistent with his statements out of court, which in turn were inconsistent with each other; as a result, his exculpatory testimony lacked credibility.

It is plain that the jury would have heard the court's comment as tantamount to an argument for conviction. How could it not? The substance of the comment was the same as part of the prosecutor's summation: it added nothing and it subtracted nothing. The prosecutor's summation was, literally, an argument for conviction. The court's comment effectively approved and adopted what was urged therein. From all that appears on the face of record, the court did not deliver the words in the passionate manner evidently employed by the prosecutor. But it delivered them nonetheless.

It is also plain that the jury would have heard the court's comment to suggest that the court itself believed defendant was guilty. Again, how could it not? Innocence depended on the credibility of defendant's exculpatory

testimony. The court expressed its own view on the question in no uncertain terms: " . . . I have difficulty in believing the testimony of the defendant."

It follows that the court's comment could only have hindered the jury in the proper consideration of the case. The remark allowed the panel "to rely on the words of the judge in returning a conviction" and so "avoid the preliminary determinations called for by the instructions on the law" (People v. Brock, supra, 66 Cal.2d at p. 651) -- determinations it clearly found difficult.

To be sure, the court told the jurors that its comment was intended to be "advisory only" and was "not binding." Such an incidental statement, however, is "insufficient to neutralize" the improper remark's "potent effect." (People v. Cook, supra, 33 Cal.3d at p. 410, fn. 9.)

The majority's discussion is generally unobjectionable so far as it goes. But it simply does not go far enough. It fails to discern that the court's comment was tantamount to an argument for conviction and, as such, could only have hindered the jury in the proper consideration of the case. That the trial judge's words were not identical to those in other cases is obvious -- and unimportant.

I now turn from the fact of error to its consequences. "Particularly in a criminal trial," such as this, "the judge's last word is apt to be the decisive

word." (Bollenbach v. United States, supra, 326 U.S. at p. 612.) The court's erroneous comment was its final remark. Evidently, it was dispositive. About four hours thereafter, the jury returned guilty verdicts on all the charges and true findings on all the allegations -- even though it had been unable to agree on any verdict or finding in the approximately nine hours that preceded. Accordingly, I am "of the opinion that the error . . . has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.)2/

IV

In passing, I make the following observations.

First, contrary to the majority's implication, I believe that a challenge, based on Stringer v. Black (1992) 503 U.S. ___ [112 S.Ct. 1130] (Stringer), to the standard jury instruction on the determination of penalty would surely prove substantial.

In Stringer, the United States Supreme Court held that "if a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive

---

2/ Because of the result I reach, I need not and do not consider whether the court's erroneous comment effectively denied defendant his right to trial by jury under either the Sixth Amendment to the United States Constitution or article I, section 16 of the California Constitution or both.

the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion" in contravention of the Eighth Amendment. (503 U.S. at p. ___ [112 S.Ct. at p. 1139].) It explained: "Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." (Id. at p. ___ [112 S.Ct. at p. 1139].) Of course, California uses "aggravating factors" -- labeled "special circumstances" (Pen. Code, § 190.2, subd. (a)) -- to determine death eligibility. It also uses "aggravating factors" -- bearing that very label (id., § 190.3) -- to decide between life and death.

A narrow Stringer challenge could specifically attack any one or more of the factors set out in the standard jury instruction on the determination of penalty as vague and, for that reason, likely to invite an arbitrary and capricious choice of punishment in violation of the Eighth

Amendment. Defendant raises such a claim against factor (a), which covers "[t]he circumstances of the crime." The majority dismiss the point. I am dubious. That "[t]he United States Supreme Court itself has established that the circumstances surrounding a capital offense constitute one of the criteria upon which the jury should base its penalty determination" (maj. opn., ante, at p. ___ [typed maj. opn. at p. 69], italics in original) is of no consequence. What is dispositive is not what jurists on appellate courts may announce, but what lay persons on juries may understand.

A broader Stringer challenge could generally attack the standard jury instruction on the determination of penalty as vague at its very core and, for that reason, highly likely to invite an arbitrary and capricious choice of punishment in violation of the Eighth Amendment. Certainly, the instruction raises more questions than it answers. For example, on what does the determination of penalty turn? What do the terms "aggravation" and "mitigation" mean? Which of the factors are potentially aggravating and/or mitigating? (See People v. Bacigalupo (1991) 1 Cal.4th 103, 152-154 (conc. opn. of Mosk, J.), vacated and remanded sub nom. Bacigalupo v. California (1992) ___ U.S. ___ [113 S.Ct. 32], for further consideration in light of Stringer v. Black, supra, 503 U.S. ___ [112 S.Ct. 1130].)

Second, factor (j) -- "[w]hether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor" -- is potentially mitigating and not potentially aggravating. "'[A]ggravation' means that which increases the defendant's personal moral culpability above the level of blameworthiness that inheres in the capital offense. By contrast, 'mitigation' means that which reduces his culpability below that level." (People v. Bacigalupo, supra, 1 Cal.4th at p. 153 (conc. opn. of Mosk, J.).) Numerous decisions of this court by many of its members establish the fact that factor (j) is potentially mitigating only. In her concurring and dissenting opinion herein, Justice Kennard proves the point beyond peradventure. Reason also establishes the fact. The question posed in factor (j) calls for one of two answers. A determination that the defendant was, in actuality, a minor accomplice may lead to the conclusion that his culpability was less than that generally reflected by commission of the offense. But a determination that he did not play such a role simply does not lead to the conclusion that his culpability was greater. Loose and uncertain dictum arguably to the contrary, which appears in a single opinion that does not cite any authority or present any analysis, should be disapproved forthwith. It should not be used, as by the majority, to "create" a "conflict" where none exists.

V

Because the court committed reversible error by commenting as it did on the evidence and defendant's credibility, I would reverse the judgment.

MOSK, J.

APPENDIX B

SUPREME COURT
FILED
MAR 10 1993
Robert Wandruff Clerk
DEPUTY

No. CR23185
S004555

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

v.

WILLIAM ARNOLD PROCTOR, Appellant

Petition for rehearing DENIED.

Mosk, J. and Kennard, J. are of the opinion the petition should be granted.

Chief Justice

APPENDIX C

Supreme Court of the United States

No.

A-894

William Arnold Proctor,

Petitioner

v.

California

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including July 8, 1993.

/S/ Sandra D. O'Connor
Associate Justice of the Supreme Court of the United States

Dated this 28th day of May, 1993.

CERTIFICATE OF SERVICE

I, Wendy C. Lascher, a member of the Bar of this Court, hereby certify that on this 8th day of July, 1993, copies of the PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA in the above-entitled case were mailed, first class postage prepaid, as follows:

Office of the Attorney General
State of California
1515 "K" Street
Suite 511
Sacramento, California 95814

District Attorney
Shasta County
1525 Court Street
P.O. Box 1320
Redding, California 96001

I further certify that all parties required to be served have been served.

Dated: July 8, 1993

Respectfully submitted,

LASCHER & LASCHER,
A Professional Corporation
WENDY C. LASCHER*,

By: Wendy C. Lascher
Attorneys for Petitioner
William Proctor

*Counsel of Record

OPINION AND ORDER BELOW

The opinion of the California Supreme Court, which is published at 4 Cal.4th 499 (1992), is reprinted in the Appendix to the petition filed herein [App. A].[1] The order denying petitioner's petition for rehearing, filed March 10, 1993, is reproduced at App. B of the Appendix to the petition filed herein.

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1. The opinion is cited as App. A, followed by a specific page number for that document. The order denying rehearing is App. B.

JURISDICTION

The opinion of the California Supreme Court was filed December 28, 1992 [Pet. App. A, p. 1]. Petitioner filed a timely petition for rehearing, which the court denied on March 10, 1993 [Pet. App. B].

On May 28, 1993, Justice O'Connor granted an extension of time to file this writ petition until July 8, 1993. Accordingly, this petition is timely under Rule 13 of the United States Supreme Court Rules.

This Court's jurisdiction to grant certiorari is properly evoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

The Eighth Amendment to the United States Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Penal Code section 190.3 provides, in pertinent part:

> "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> "(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.
>
> "(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> "(c) The presence or absence of any prior felony conviction.
>
> "(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> "(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
>
> "(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
>
> "(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.
>
> "(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects [sic] of intoxication.
>
> "(i) The age of the defendant at the time of the crime.
>
> "(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crimes.

"(l) After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. . . ."

STATEMENT OF THE CASE

Procedural History

On April 23, 1982, petitioner William Arnold Proctor was arrested in connection with the murder of Bonita Bergh Stendal in the Northern California community of Redding. CT 481-483, 500-501.[2] He had been released two weeks earlier from the custody of the California Youth Authority.

On May 5, petitioner was charged with three felony counts:

(1) First degree murder of the victim (California Penal Code section 187[3]), with four special circumstances:

(a) Murder in the course of burglary (§§ 460 and 190.2(a)(17));

2. There were two reporter's transcripts in connection with the state court appeal. One reflects the guilt phase and mistried penalty proceedings in Shasta County. The other is for the subsequent retrial of the penalty phase in Sacramento County. Most file documents appear in a single clerk's transcript, with unitary pagination, cited as "CT." The Shasta court's jury instructions are collected in a separate transcript, cited as "Supp. CT."

3. All statutory references not otherwise qualified are to the California Penal Code.

(b) Murder in the course of rape (§§ 261 and 190.2(a)(17));

(c) "Especially heinous, atrocious, or cruel, manifesting exceptional depravity" murder (§ 190.2(a)(14) (petitioner's motion to dismiss this allegation was later granted) (CT 252-253); and

(d) Intentional murder involving torture (§ 190.2(a)(18)). (CT 1:1-2:22.)

(2) Rape accompanied by great bodily injury (§§ 261 and 12022.8). CT 2:23-3:3.

(3) Burglary (§§ 261 and 12022.7). CT 3:5-18; CT 6-8.

After a preliminary hearing, petitioner was held to answer for the three felonies. CT 4-5 and 10-155. Petitioner pleaded not guilty to each charge and denied the "special allegations." CT 159-160.

Two months before trial began, petitioner filed a motion for change of venue, which the court heard, considered and denied. CT 176-177, 180 and 196. The day voir dire was completed, petitioner renewed his motion to change venue, which was again heard, considered and denied. CT 274-286.

The jury was seated on December 8, 1982. The trial lasted only four court days. CT 287-299. The jury began deliberating on December 15. CT 3000. On December 20, a day after the jury announced a potential deadlock, the trial judge commented on the evidence, including his view of petitioner's

credibility. Within a few hours, the jury returned a verdict convicting petitioner of first degree murder with all then-remaining special circumstances, of rape with great bodily injury,a nd of first degree burglary with great bodily injury. CT 310-313.

The penalty phase began the next morning. After less than two hours of deliberation, the jury foreman announced the jury was deadlocked beyond possibility of resolution, whereupon the court ordered a mistrial and discharged the jury. CT 314-315.

On January 6, 1983, petitioner renewed his motion for a change of venue, which was granted. CT 323-351. The case was transferred to Sacramento County for retrial of the penalty phase only. CT 351-354. The second jury returned a verdict finding that the aggravating circumstances outweighed the mitigating ones, and that death was the appropriate punishment. CT 376-396 and 467-472.

On June 28, 1983, the Sacramento court (Hon. Sheldon H. Grossfeld) heard, considered and denied petitioner's automatic motion for modification of judgment. § 190.4(e); CT 528-555A. Petitioner's appeal to the California Supreme Court followed automatically. CT 558. Following the death of the attorney appointed to represent petitioner and appointment of another additional counsel, the California Supreme Court heard argument in October of 1992.

ISSUES RAISED BELOW (RULE 14(h))

***Stringer* v. *Black* (Vagueness) Challenge:**

Petitioner claimed California's statutory sentencing factor set forth in Penal Code section 190.3(a) is ambiguous, and challenged application of this factor to his case. Further, when the California Supreme Court ordered supplemental briefing in 1992, petitioner raised an issue regarding the penalty phase jury's use of Penal Code section 190.3(a) in determining his sentence under *Stringer* v. *Black*, *supra*, 503 U.S. ___, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992). One dissenting justice of the California court addressed the general issue of statutory vagueness in his dissenting opinion while the majority dealt only with the issue raised by petitioner. App. A, Dissenting Opinion by Mosk, pp. 14-128.

STATEMENT OF THE FACTS[4/]

Guilt Phase

Fifty-five-year-old widow Bonnie Stendal lived at 1670 Ponderosa Street in Burney. RT 2758. Burney is a small mountain community located 35 miles east of Redding in Shasta County. Mrs. Stendal taught first grade at the East Burney Elementary School. RT 2380.

Mrs. Stendal's 19-year-old son, David Stendal, lived with her at the Ponderosa Street home until the summer of 1979 when he moved to Chico. RT 2782. David Stendal had been friends

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4. All record references in this fact statement are to the Shasta County reporter's transcript, unless otherwise noted.

with petitioner William Proctor and another young man, Robert Manley, for several years before he moved to Chico.

The three young men had smoked marijuana together and petitioner knew that David Stendal frequently concealed marijuana from his mother by hiding it in various places in Mrs. Stendal's home.

In January of 1981, petitioner began the general truck driving course at the Western Truck School. Robert Schauer was petitioner's instructor at the Western Truck School and during the truck driving course petitioner received instruction on knot tying. RT 2730. Students in the truck driving school were taught to tie the trucker's hitch, two half hitches, and a sheep shank knot. RT 2730.

In April of 1982, Mrs. Neta Manley was living with her family which included her 26-year-old son Robert Manley, at 1561 Birch Street in Burney. RT 2608-2609. The Manley home on Birch Street was about a block from Mrs. Stendal's home. RT 2803.

After an absence from the Burney area, petitioner returned in the early part of 1982, and on Friday or Saturday, either April 16th or 17th, 1982, petitioner and Robert Manley made several obscene telephone calls from the phone at Manley's home. RT 2682. Robert Manley telephone Mrs. Stendal and petitioner listened to Manley in the course of that conversation. RT 2682. The conversation was of a sexual nature, and Manley told Mrs. Stendal he would like to have sexual relations with her. RT 3089. Petitioner also admitted making an obscene

telephone call during about the same time. RT 3088. The calls were made at about 3 or 4 a.m. in the morning. Four or five calls were made in total. Petitioner made one call. Robert Manley dialed a phone number, handed petitioner the phone, and petitioner then completed the obscene portion of the call. RT 2682, 3090.

Mrs. Manley worked as a custodian at Burney High School and on Wednesday afternoon, April 21, 1982, she arrived home between 2:30 p.m. and 3 p.m. after getting off work. RT 2610.

Petitioner was at the Manley home when Mrs. Manley got there. RT 2611. Petitioner had hitchhiked to the Manley home earlier that afternoon. RT 2640.

Between 3 and 5 p.m, Mrs. Manley took petitioner to the Holiday Market in Burney to buy some liquor. RT 2641.

When Mrs. Manley and petitioner got back to the house, they had a drink with Robert Manley and later the three had dinner. RT 2642.

At about 5:30 p.m., petitioner and Robert Manley walked to a nearby Fast Gas convenience market to buy cigarettes. RT 2643. Manley bought two packs of Camel non-filter cigarettes and gave one pack to petitioner. RT 2644. Both petitioner and Manley smoked the same brand of cigarettes. RT 2644.

Mrs. Manley left the house at about 7 p.m. that evening to go to the bowling alley where she kept score. RT 2644. When Mrs. Manley left, petitioner and Robert were sitting on chairs in the living room watching television. RT 2643.

On April 21, 1982, during the evening hours, Mr. Robert Schmidt, a sixth grade teacher at the Mt. Burney Elementary School, saw Mrs. Stendal at the Safeway store in Burney. Mr. Schmidt had a brief conversation with her. RT 2368.

Later that evening, at approximately 7:40 p.m., Mrs. Schmidt again saw Mrs. Stendal, this time at the Thrifty drug store in Burney. RT 2368.

Meanwhile, Robert Manley had started watching a baseball game on television shortly after 8 p.m. Petitioner said he did not want to watch it and told Manley he was leaving. RT 2645. Petitioner told Manley he was going to the local bar, either to the Rex Club or to the Sportsman Bar, to pick up a woman. RT 2646. Petitioner asked Manley if he wanted to go, but Manley said no. Before leaving, petitioner telephone his mother and told her he was going to spend the night at Manley's home. RT 2646, 2722.

At about 8:10 p.m. on April 21, petitioner arrived at Jeffrey Bohall's home at 1832 Maple Leaf Street in Burney. RT 2696. The Bohall home was about five blocks from the Manley home. RT 2803.

Petitioner remained at the Bohall home for about 45 minutes. When he left, petitioner told Jeff Bohall he was "going out to catch a buzz" and that he was "going to get a piece of butt." RT 2695.

At approximately 7:50 p.m. on April 21, 1982, Patty Olinger was in her car as it was being pushed through the intersection at Marquette and Ponderosa Streets in Burney.

As she looked down Ponderosa Street to Mrs. Stendal's home, Mrs. Olinger noticed that the residence was very well lit up and that Mrs. Stendal's car was in the driveway. RT 2375.

Mrs. Olinger had known Mrs. Stendal for two years, and during that time, Mrs. Stendal had never parked her car in the driveway. RT 2375. According to Mrs. Olinger, she always Drove in a direct line into the garage. RT 2375.

Mrs. Olinger also noticed that there was mud on Mrs. Stendal's car and that this was quite unusual since she always kept her car clean. RT 2376.

When Mrs. Manley returned home between 10:30 and 11 p.m. on April 21st, petitioner was not there and Robert was alone, watching a baseball game on television. RT 2614. Mrs. Manley sat down in her chair and watched television until she went to bed between 11:30 and 11:45 that evening. RT 2616.

Petitioner's mother, Julia Ann Proctor, testified that he did not return home on the night of April 21, 1982. RT 2721-2722.

Mrs. Stendal was brutally murdered during the time between the early evening hours of April 21st and the early morning hours of April 22nd. RT 2942-2943.

At approximately 5:30 a.m. on the morning of April 22, Sharon Palkki was in the kitchen of her home at 1649 Marquett

Street in Burney. Mrs. Palkki had known petitioner, her nephew, for a number of years. RT 2707.

As Mrs. Palkki looked out her kitchen window, she saw petitioner walking north down Marquette Street. Mrs. Palkki saw that petitioner had what looked like a pair of gloves in his right pants pocket. RT 2710. Mrs. Palkki's home was about 500 feet from Mrs. Stendal's home. RT 2803.

Between 6 and 7 on the morning of April 22, petitioner's brother, Edward Proctor, received a phone call at home from petitioner. RT 2703. Petitioner told his brother he was at the parking lot of the Holiday market in Burney and requested that his brother ask their mother to come and pick him up. RT 2703.

Meanwhile, Mrs. Stendal had not arrived to teach her first grade class. Mrs. Stendal normally arrived at the school at approximately 7:45 a.m. RT 2380-2381.

At approximately 8:55 a.m., April 22, 1982, the secretary at the elementary school, Ms. Humble, began to call Mrs. Stendal's home after she had been told that Mrs. Stendal had not shown up for school that morning. RT 2380-2382.

Ms. Humble went to Mrs. Stendal's home at about 9:05 a.m. RT 2382. Ms. Humble entered the house through an unlocked patio door, and briefly searched inside for Mrs. Stendal. She called out Mrs. Stendal's name in an attempt to locate her. At the time, Ms. Humble noted that a magazine was next to a living room couch, along with a heating pad. RT 2385. She also noted a

jar of pickles, and a caring fork on the kitchen counter. In addition, she noted a pair of slippers on the floor of the master bedroom. RT 2389.

Ms. Humble was unable to locate Mrs. Stendal and just as she was getting ready to leave, she checked the garage and saw that Mrs. Stendal's car, a 1978 silver Mercury, was parked in the garage. The police were notified of the school authorities' concern over Mrs. Stendal's absence. RT 2387.

Detective Sergeant Larry Jarrett of the Shasta County Sheriff's Department responded to the call regarding Mrs. Stendal's absence from work. RT 2398.

Detective Jarrett went to the Stendal home at approximately 9:30 a.m., and conducted a brief search for Mrs. Stendal.

Sergeant Jarrett was unable to find Mrs. Stendal but he did notice that the bed in the master bedroom was not made. RT 2403. After about five minutes Sergeant Jarrett left. RT 2404.

Sergeant Jarrett reported his findings to Lieutenant Eoff and the two men decided to return to the house to conduct a more detailed investigation. RT 2404. When they returned to the house later that morning, the officers noted that telephone lines within the home had been cut. One phone line had been cut in the den, and the other had been cut in the kitchen area. Officers also noted that Mrs. Stendal's car appeared to be muddy and that water was still dripping from it onto the garage floor when they arrived. They also noted that the trunk lid portion of the car

appeared to have been wiped down in an apparent effort to clean it. Later, a locksmith was called and the trunk was opened. On the edge of the trunk door opening, there appeared to be an area which was scraped or rubbed clean. Further, although there was nothing out of the ordinary in the trunk, officers noted that objects normally stored in the trunk appeared to have been pushed to the outer edge of the trunk floor, so that it appeared that room had been made in the center of the trunk floor so an object could be placed there. RT 2404-2406.

Officers noted that, generally, there appeared to be no sign of a struggle. They did note, however, that several of the hooks on the drapes for the patio door had been pulled from their hangers. RT 2411.

While the police were still trying to locate Mrs. Stendal, Robert Manley got up at approximately 11:30 a.m. on April 22nd and phoned petitioner. RT 2651. Petitioner told Manley that as he was walking downtown in front of Bernard's grocery store the night before, his mother drove up and picked him up and took him home. RT 2652. Petitioner then said that he would come to town later that day after he finished washing his clothes. RT 2654.

As all of the was taking place in Burney, Susan Porter and her new husband were driving back to Portland, Oregon, from Reno where they had been married on the morning of April 22, 1982. The Porters stopped their car near Lake Britten on the afternoon of April 22 to let their dog out. RT 2393. The

turnout where the Porters stopped was approximately 12 miles from Mrs. Stendal's home in Burney. RT 2442.

Mr. Porter got out of the car first and as Mrs. Porter was getting her camera ready, he came back to the van and said that he thought there was a dead body over the side of the cliff alongside the road. RT 2394-2395.

Mrs. Stendal's body was found approximately 11 feet below the edge of the roadway. There were no footprints in the immediate area of the body. It appeared that the body had been thrown from the edge of the roadway to its resting place. The body was in an upright or seated position, and had become entangled in several thorns and bushes at that location. RT 2437.

Mrs. Stendal was wearing only a nightgown. She had a green electric blanket wrapped around her. Mrs. Stendal's hands were tied behind her back with four separate cloth materials. One of the cloth items was a red, white, and blue tie or sash-like article of women's apparel. The other was a red and white cloth rolled or twisted into the shape of a rope, and tied in a "figure 8" pattern around the victim's wrist. The remaining two items were nylon stockings, one of which was tied around the victim's left wrist, three times, and tied with a single loop around the right wrist. The other nylon stocking was tied around the victim's wrist with several half hitch type knots. RT 2956.

Meanwhile, between 3 and 3:30 p.m. on April 22, 1982, Mrs. Manley drove Robert to petitioner's home in Burney to pick

up petitioner since the two boys wanted a ride into Redding. RT 2619.

Petitioner and Manley wanted to purchase some concert tickets in Redding. They were also planning to drink and were hoping to meet some girls. RT 2656. Later that day petitioner and Manley met two girls in Redding, drank beer with them, and spent the night with them at a motel in Redding. RT 2656-2664. Mrs. Manley had by that time returned back to Burney in the late afternoon or evening of April 22. RT 2620.

The next day, April 23, after it was determined that the petitioner was a possible suspect, he and Robert Manley were taken into custody in REdding as they were hitchhiking back to Burney. RT 2665.

Early in the afternoon on Friday, April 23, 1982, petitioner was interviewed by Detective Jarrett at the Sheriff's Office in Redding. RT 2803-2804. Petitioner told Detective Jarrett he had been at Robert Manley's house on the evening of April 21. RT 2806. Petitioner told Detective Jarrett he left Manley's house "at around 8:30, right after a baseball game came on," and that he "walked downtown" and "caught a ride home." RT 2806-2807. He said he caught a ride with a guy in a Chevy pickup in front of the Holiday market. RT 2807.

Petitioner said he spent the remainder of the evening at home and went to bed at about 11 p.m. RT 2807. Petitioner told Detective Jarrett he got up at around 9 a.m. the next

morning, and that he did not leave home until around 3:30 or 4 p.m. RT 2807-2808.

When Detective Jarrett asked petitioner if he had gone to Mrs. Stendal's home the evening of April 21, he said he had *not* gone there. RT 2811.

After petitioner had been taken into custody on April 23, 1982, Shasta County Sheriff's Detective Francis Brewer observed abrasions on both of petitioner's legs, below the knees, and five or six scratch marks on his left leg, above the knee. RT 2541. Photographs were taken of these marks. RT 2540-2543; Exhibit 43.

The coroner of San Francisco, Dr. Boyd Stephens, autopsied Bonnie Stendal's body on April 24, two days after it was discovered. RT 2868-2871. It was Dr. Stephens' expert opinion that the cause of death was asphyxiation, first by nonfatal manual strangulation, and later by ligature strangulation. RT 2875-2876. Mrs. Stendal's body also showed cuts and bruises from blunt force and various internal injuries, basically related to the face and neck (RT 2876-2877, 2879, 2886-2888), some of which were inflicted by seven to nine blows. RT 2888-2889. Post mortem injuries were attributed to the dragging of Mrs. Stendal's already dead body. These injuries eliminated the place of discovery as the site of the killing. RT 2879-2884.

A number of stab wounds and incisions made by a cutting instrument were found in the neck area; most of which did not

penetrate the skin deeply. These wounds were inflicted while Mrs. Stendal was immobile, and still alive, as were cuts in the chest area. RT 2889-2896, 2898-2899. These cuts were inflicted close to Mrs. Stendal's death. RT 2905. None of the stab wounds were directly involved in causing Mrs. Stendal's death. RT 2875-2878, 2922.

The curvature of some of the injuries indicated they had been inflicted slowly and deliberately. There were seven wounds less than two inches deep to the area of the right breast which had been inflicted while Mrs. Stendal still was alive but unable to move away from her assailant. In Dr. Stephen's opinion, these wounds were infliced for the purpose of causing pain or fear. RT 2890.

There were four stretching injuries outside the vagina and a fifth abrasion which was said to slide into the opening of the vagina. RT 2913-2914, 2915-2917. These injuries were caused by more than one force, four by a foreign object, possibly a penis, though of a type more often caused by something else, and a fifth probably by a penis. RT 2917-2918, 2919. There was no lubrication of the area, nor was there any sign of semen in or about any portion of the bag. RT 2918-2920. The autopsy surgeon described the knots which tied the victim's hands as possibly "truckers' hitches" knots. RT 2912-2913.

On April 24, Dr. Stephens also examined the marks on petitioner's legs, and described them as one to four days old.

Dr. Stephens had seen "these injuries" in "sexual assault" cases he had examined in San Francisco. RT 2543-2544, 2927-2928.

Mrs. Schauer of the Western Truck School recognized one of the knots used to tie Mrs. Stendal as a double half hitch knot taught at his school. RT 2734. Similarly, Mr. Schauer recognized another of the knots used to tie Mrs. Stendal as a trucker's knot which is also taught at the school. RT 2731.

Additional investigation was carried out at the victim's residence on April 30, 1982, with the assistance of Justice Department technicians and criminalists. On this occasion, the police found several magazines and pamphlets on the floor beneath the bed in the master bedroom. RT 2444. Three of these magazines had bloody prints on them, and at least two or the magazines had what appeared to be bloody palm prints on them. The palm print on one of these magazines, a religious periodical called, "Reflections," was positively identified by more than 35 comparison points as being petitioner's right palm print. RT 2831-2833. Investigation revealed that the print was made when petitioner's right palm came in contact with Mrs. Stendal's blood, and then was transposed onto the magazine cover. RT 2835. The print *was not made* by petitioner's clean hand being placed onto an already bloody magazine. A palm print lifted from another magazine positively matched petitioner's left palm. RT 2844. In addition, there was a small amount of blood under an area rug in Mrs. Stendal's bedroom. This blood was found to have been the same type as that of the victim. No other fingerprints

matching petitioner's were found in Mrs. Stendal's home. Further, the victim's automobile was checked for prints, and again none of petitioner's prints were found on the car. The officers did determine, however, that the door to the master bedroom had been wiped down with a damp rag which left little spots of dirty water on the door. RT 2491.

On May 1, 1982, Detective Jim Carter of the Shasta County Sheriff's Department interviewed petitioner's mother after she had visited petitioner in jail. RT 2728.

Mrs. Proctor told the officer that petitioner had asked her to tell Detective Jarrett that he had spent the night of the murder at home. Mrs. Proctor told petitioner that she had already talked to Detective Jarrett and told him petitioner had not spent the night at home. RT 2728.

Petitioner then asked his mother if she would tell Detective Jarrett that he had been at a party that night. RT 2728.

On May 2, 1982, Sergeant Jarrett returned to the Stendal home for a further investigation and on this occasion he found a cigarette butt on the ground outside a window on the east side of the residence. The cigarette butt was from a non-filter cigarette. RT 2448.

On the sill of the window Detective Jarrett saw indications that a hand had been on the dust, but no usable print could be lifted. RT 2448-2450.

Defense

Petitioner testified on his own behalf.

Petitioner had been friends with Mrs. Stendal's son David Stendal and Robert Manley for several years.

Petitioner testified that on April 21, 1982, he was living with his mother and two brothers on Main Street in the Johnson Park area of Burney.

At approximately 6 p.m. on the evening of April 21, 1982, petitioner was at Robert Manley's house, listening to music and drinking.

Petitioner testified that he and Manley were planning on going to see the rock group Journey at a concert in Chico. Petitioner testified that Manley did not have any money and that petitioner had to pay for everything.

Petitioner claimed that Manley had talked a lot about the kind of drugs that David (Stendal) kept in the house and about the kind of drugs that David's mom (Mrs. Stendal) had been using or something to that effect. RT 3031.

Petitioner admitted that between 8:30 and 9 p.m. he left the Manley home and went to the home of another friend, Jeff Bohall. RT 3026.

Petitioner testified he talked with Jeff Bohall and left when Bohall said he was not interested in finding some people to party with. RT 3027. Petitioner testified he left Bohall's house between 9:30 and 10 p.m. and went to a liquor store called the Bottle Shop to buy some cigarettes. RT 3077.

Petitioner claimed that from the liquor store he walked back to the Manley home, arriving there around midnight. RT 3028.

Petitioner testified that Mrs. Manley's truck was at the house when he returned and that he used the back door to enter. RT 3028-3029.

Petitioner testified that he looked for Robert Manley but could not find him in the house and eventually went to bed in the upstairs bedroom.

Petitioner claimed that he slept for a couple of hours and then woke up and started looking for Robert Manley again. Petitioner testified that when he awoke and started looking for Manley it was just starting to get light outside. Petitioner claimed that he again could not find Manley but that he did find a note on the side of Manley's dresser. RT 3030.

According to petitioner, the note was addressed to "Bill" and said that "he (Manley) was going to check Stendal's stash" and that "he'd be back shortly." RT 3030-3031.

Petitioner testified that he thought the note meant that Manley was planning on getting some drugs from the Stendal's house and selling them." RT 3033.

According to petitioner, after reading the note, he walked to the Stendal home. RT 3034.

Petitioner testified that when he got to the Stendal home, the lights in the front room were still on (RT 3035), and that the sliding glass door was open.

Petitioner testified that after he entered Mrs. Stendal's home he began looking for Bob Manley but no one was home.

Petitioner claimed that when he went into Mrs. Stendal's bedroom he noticed a puddle of blood next to the bed. RT 3039. Petitioner claimed that he "just kind of tested the blood" with his hand. RT 3040.

Petitioner said he did not recall touching any of the pamphlets which were then located on the floor between the night stand and the bed. RT 3039-3040.

Petitioner testified that it had been more than a year since he had been in the Stendal home prior to April 21, 1982. RT 3032.

ARGUMENT SUMMARY

Petitioner challenges the constitutionality of California's 1978 death penalty law on the following grounds:

(1) That the entire statute is vague because Penal Code section 190.3 supposedly does not specify which of its 11 sentencing factors are aggravating and which are mitigating.

(2) That the prosecutor's argument and the jury instructions in the instant case exacerbated the alleged vagueness of the aggravating and/or mitigating factors.

(3) That the "circumstances of the offense" factor (Penal Code § 190.3(a)) is especially vague where the jury which initially determined the defendant's guilt is not the same jury which determines his sentence.

ARGUMENT

I.

PETITIONER'S CLAIM THAT THE SENTENCING FACTORS LISTED IN CALIFORNIA PENAL CODE SECTION 190.3 ARE UNCONSTITUTIONALLY VAGUE AND SUBJECT TO ANALYSIS UNDER *STRINGER* IS NOT PROPERLY BEFORE THIS COURT SINCE IT WAS NOT RAISED BELOW AND LACKS MERIT IN ANY EVENT

Petitioner now contends for the first time that all of the eleven sentencing factors listed in Cal. Penal Code section 190.3[5/] are facially vague, in violation of the limitations

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5. Penal Code section 190.3 specifies that the factors which the jury shall take into account in selecting the appropriate penalty in a capital case are:

> (a) The circumstances of the crime. . . .
> (b) The presence or absence of criminal activity . . . which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
> (c) The presence or absence of any prior felony conviction.
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
> (e) Whether or not the victim was a participant. . . .
> (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
> (g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.
> (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication.
> (i) The age of the defendant at the time of the crime.
> (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

imposed by the Eighth Amendment to the federal Constitution as interpreted by this Court in *Stringer* v. *Black*, 503 U.S. ___, 117 L.Ed.2d 367, 382, 112 S.Ct. 1130 (1992). Specifically, petitioner argues that a jury deciding whether to impose the sentence of death or life imprisonment must weigh these eleven factors even though the statute does not specifically designate which factors are aggravating and which are mitigating. Petitioner argues that none of these factors are adequately defined for the purpose of allowing the jury to use them in making a rational sentencing choice in capital cases.

This is the first time in this case that petitioner has raised this general vagueness challenge to the constitutionality of all 11 factors set forth in California Penal Code section 190.3. The only mention of this issue appears for the first time in dicta in Justice Mosk's dissent. The majority opinion correctly notes that the actual claim raised by petitioner focused only on a vagueness challenge to the constitutionality of section 190.3 factor (a). Opn., p. 69-70.

Petitioner now seeks to expand this limited claim into a wholesale challenge to the constitutionality of the entire list of factors set froth in Penal Code section 190.3 without ever raising this expanded issue in either the trial court or on his direct appeal to the California Supreme Court.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

Petitioner should not be allowed to belatedly raise this claim for the first time in these proceedings. Furthermore, even if petitioner's *Stringer* claim is properly before this Court it must be denied since the vagueness concerns enunciated in *Stringer* have no application to the sentencing factors set forth in Penal Code section 190.3.

Petitioner interprets this Court's remand in *Bacigalupo* v. *California* as the specific application of *Stringer* by this Court to Cal. Penal Code section 190.3. Pet. at 16, citing *Bacigalupo v. California*, 506 U.S. ___, 121 L. Ed. 2d 5, 113 S. Ct. 32 (1992). To the contrary, this Court's order in *Bacigalupo* was nothing more than a remand to reconsider that case in light of this Court's opinion in *Stringer*.

In *People v. Bacigalupo*, the California Supreme Court rejected a challenge to Cal. Penal Code section 190.3, subsection (b), observing that the Eighth Amendment vagueness analysis, which Petitioner is now relying on, applies only to those factors which narrow the class of death-eligible defendants. *People v. Bacigalupo*, 1 Cal. 4th 103, 147-148. On October 5, 1992, this Court granted certiorari, vacated the judgment, and remanded that case to the California Supreme Court for further consideration in light of *Strihger*. *Bacigalupo*, 121 L. Ed. 2d at 5. The matter is now pending before the California Supreme Court in case number S004764.

Petitioner's belated claim that all of the eleven factors set forth in section 190.3 are subject to a federal

constitutional vagueness analysis is based on an erroneous assumption that California's death penalty procedures are identical to the Mississippi death penalty system reviewed in *Stringer*. In *Stringer*, the state of Mississippi sought to establish that its system could be equated with the capital punishment procedures in Louisiana which had survived constitutional challenge in 1988.

In Louisiana, the narrowing of the death eligible class occurs with the finding of capital murder in the guilt phase, after which the jury must find at least one aggravating circumstance, but is not required to weigh aggravating versus mitigating factors in order to return a verdict of death. This Court upheld the Louisiana procedures, finding its use of aggravating circumstances was not comparable to their use in other states, such as Florida i.e., so called "weighing" states. *Lowenfield v. Phelps*, 484 U.S. 231, 244-245, 98 L. Ed. 2d 568, 108 S. Ct. 546 (1988); compare *Sochor v. Florida*, 504 U.S. ___, 119 L. Ed. 2d 326, 112 S. Ct. 2114 (1992); and *Espinoza v. Florida*, 505 U.S. ___, 120 L. Ed. 2d 854, 112 S. Ct. 2926 (1992).

Mississippi argued that since Mississippi narrowed the death eligible class in the guilt phase by requesting the jury to first convict the defendant of capital murder, the use of aggravating factors in Mississippi had no constitutional significance. The Mississippi Supreme Court had, however, stated in no uncertain terms that its "sentencing scheme operates in the same manner as the Florida system." *Stringer*, 117 L. Ed. 2d at

381. The Mississippi statute was also interpreted by the United States Supreme Court in light of *Godfrey v. Georgia*, 446 U.S. 420, 64 L. Ed. 2d 398, 100 S. Ct. 1759 (1980) and *Maynard v. Cartwright*, 486 U.S. 356, 361-362, 100 L.Ed.2d 372, 108 S.Ct. 1853 (1988), which dealt with the adequacy of state aggravating circumstances to channel the sentencer's discretion by narrowing the death-eligible class. See also *Shell v. Mississippi*, 498 U.S. ___, 112 L.Ed.2d 1, 111 S. Ct. 313 (1990) [reversing because of inadequate aggravating factor, citing *Maynard* and *Godfrey*]. In contrast to the situation presented in *Stringer*, neither this Court, or the California Supreme Court has interpreted the California death penalty procedures as operating in the same manner as another state wherein aggravating factors have been held to have constitutional significance.

Stringer held that the Mississippi statute which uses aggravating factors in deciding *both* who shall be eligible for the death penalty and who shall receive the death penalty, cannot use factors which as "a practical matter fail to guide the sentencer's discretion." *Stringer*, 117 L.Ed.2d at 381. In such sentencing procedures, i.e., where the aggravating factors are used both to determine who is eligible for the death penalty and who shall receive it, "use of a vague or imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system." *Stringer*, at 383; see

also *Espinoza*, 120 L. Ed. 2d at 858-859; *Sochor*, 119 L. Ed. 2d at 336.

The remand by this Court of *Bacigalupo* in light of *Stringer* does not compel the conclusion that a vagueness analysis applies to California's section 190.3 sentencing factors. In fact, application of *Stringer* would be inconsistent with this Court's well-established death penalty jurisprudence.

The constitutional requirements which a state must satisfy before imposing a death sentence were succinctly summarized in *McCleskey v. Kemp*, 481 U.S. 279, 305-306, 95 L. Ed. 2d 262, 107 S. Ct. 1756 (1987), emphasis added:

> "In sum, our decisions since *Furman* [v. *Georgia* (1972) 40 U.S. 238] have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that *narrow the decision maker's judgment* as to whether the circumstances of a *particular defendant's case meet the threshold*. Moreover, a societal consensus that the penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must *allow it to consider any relevant information offered by the defendant.*"

Once these limits have been satisfied, "the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." *Blystone v. Pennsylvania*, 494 U.S. 299, 309, 108 L. Ed. 2d 255, 110 S. Ct. 1078 (1990).

While it is incumbent upon a state to narrow the class of death-eligible defendants, there is no exclusive "right way

for a State to set up its capital sentencing scheme." *Spaziano v. Florida*, 468 U.S. 447, 464, 82 L. Ed. 2d 340, 104 S. Ct. 3154 (1984). Accordingly, this Court has found that the narrowing function may take place at either the guilt *or* penalty phase in a capital case. *Lowenfield*, 484 U.S. at 244-245.

In many states the jury's discretion is channelled through the use of aggravating circumstances, one of which must be found true before a death sentence can be appropriate. *Lowenfield*, 484 U.S. at 244. The Eighth Amendment does not compel that such aggravating circumstances be further refined or weighed by the jury. *Blystone*, 494 U.S. at 298. These aggravating circumstances which must be found true before a death sentence can be appropriate are referred to as "special circumstances" in California Penal Code § 190.2.

For those states which employ these aggravating or special circumstances to narrow the death-eligible class, the circumstances must "furnish principled guidance for the choice between death and a lesser penalty." *Richmond v. Lewis*, 506 U.S.___, 121 L. Ed. 2d 411, 113 S. Ct. 528, 91 U.S.L.W. 4013, 4015 (1992). The circumstance must "genuinely narrow the class of persons" eligible for death and must "reasonably justify" the death penalty on the defendant as compared to other convicted murders. *Zant v. Stephens*, 462 U.S. 862, 877, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983). An aggravating circumstance which a "person of ordinary sensibility" could find applicable to any murder will not suffice. *Godfrey*, 446 U.S. at 428-429 [absent

some judicial limitation, an outrageously or wantonly vile, horrible, and inhuman aggravating factor did not adequately limit the jury's discretion].

This Court's Eighth Amendment jurisprudence demonstrates that it is primarily concerned with the *procedure* by which the state imposes a death sentence rather than with the substantive factors considered by the sentencer once the defendant falls within the class of persons *eligible* for the death penalty. *California v. Ramos*, 463 U.S. 992, 999, 77 L. Ed. 2d 1171, 103 S. Ct. 3446 (1983). After the jury's discretion has been adequately channelled by narrowing the class of death-eligible defendants, it is then free to consider "a myriad of factors to determine whether death is the appropriate punishment." *Ramos*, 463 U.S. at 1008. The jury may, at that point, "exercise unbridled discretion" in reaching its sentencing verdict. *Zant*, 462 U.S. at 875.

Each "distinct system must be examined on an individual basis." *Gregg v. Georgia*, 428 U.S. 153, 195, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976). In light of the above principles, an examination of California law will reveal that *Stringer* has no application to California's 190.3 factors.

Under Mississippi law a finding of "capital murder" is not designed to channel juror discretion, but is a necessary prerequisite to a sentencing hearing in the same way that a California jury must find first degree murder before the defendant is death-eligible. See Miss.Code.Ann., §§ 97-3-19; 97-

3-21; see also *Cabana v. Bullock*, 474 U.S. 376, 385, 88 L. Ed. 2d 704, 106 S. Ct. 689 (1986) [discussing "capital murder" under Mississippi law].

Under Mississippi's statute the aggravating factor first narrows the class and then effectively creates a presumption of death unless outweighed by any mitigation evidence. *Stringer*, 117 L. Ed. 2d at 381-382. This Court has described Mississippi as a "weighing state." *Stringer*, 117 L. Ed. 2d at 378; see also *Richmond*, 121 L. Ed. 2d at 421 [characterizing Arizona as a "weighing state"].

While California requires jurors to weigh aggravating and mitigating factors during the penalty phase, it is not clear that this process makes California a "weighing" state within the meaning of United States Supreme Court cases. In *Stringer*, this Court focused on the fact that the sentencing authority must first find an aggravating circumstance which narrows the death-eligible class, and then weigh against that finding any mitigation. This is entirely different from California's statutory procedure.

Petitioner is no doubt focusing on the language in *Stringer* which states that an "aggravating factor" subject to Eighth Amendment analysis includes a factor used "in deciding who shall be eligible for the death penalty or *who shall receive the death penalty.*" *Stringer*, 117 L. Ed. 2d at 381, emphasis added. The fact remains, however, there is no reason to read the language underlined above as referring to California's penalty

determination procedures under Cal. Penal Code § 190.3. The reason is that the Mississippi system simultaneously addresses both "eligibility for" and "who shall receive" the death penalty in a unitary aggravating circumstance determination. California's unique statutory procedures do not address both facets simultaneously, and is, therefore, not even indirectly considered in *Stringer*.

Before a criminally charged defendant is eligible for death in California, that person must be convicted of first degree murder and at least one special circumstance, found true beyond a reasonable doubt. California Penal Code, § 190.1. "A single valid special circumstance finding is sufficient to determine that defendant is eligible for the death penalty." *People v. Bittaker*, 48 Cal. 3d 1046, 1102, 259 Cal. Rptr. 630, 774 P.2d 659 (1989). California's special circumstances findings are, of course, subject to Eighth Amendment vagueness analysis. See, e.g., *People v. Davenport*, 41 Cal. 3d 247, 260-271, 221 Cal.Rptr. 794, 710 P.2d 861 (1985) [torture special circumstance]; *People v. Edelbacher*, 47 Cal. 3d 983, 1025, 254 Cal. Rptr. 586, 766 P.2d 1 (1989) [financial gain special circumstance].

In Mississippi, the narrowing factors and sentencing factors are indistinguishable. The Mississippi aggravating factors (referred to as special circumstances in California) are the *only* factors the jury may consider in deciding whether death is appropriate. See Miss.Code Ann., § 99-19-101(5).

In contrast, California special circumstances are a part of the sentencing considerations through application of factor (a) of section 190.3, but are not the sole basis used by a jury to decide whether a death sentence is appropriate. Indeed, the California Supreme Court has held that it is the *facts* underlying the special circumstances, as opposed to the true finding of circumstances, which is of particular significance to the penalty jury. See, e.g., *People v. Silva*, 45 Cal.3d 604, 632-636, 247 Cal. Rptr. 573, 754 P.2d 1070 (1988) [jury not misled by consideration of three improper special circumstances]. For these reasons, special circumstances have a substantially different impact in California's statutory scheme compared with the aggravating circumstances in Mississippi. California's special circumstances narrow the class of death-eligible defendants while Mississippi's aggravated circumstances both narrow the class *and* determine if death is appropriate. Those found death eligible in California then proceed to a penalty trial where the fact finder determines which of two penalties is appropriate using the Cal. Penal Code § 190.3 criteria.

Federal concerns which relate to an unwarranted conviction or an inadequate narrowing of the death-eligible class cannot properly be interjected into the process by which the jury determined which penalty is appropriate for a concededly death-eligible defendant. See *Ramos*, 463 U.S. at 1009. It is clear that this Court's Eighth Amendment concerns in *Stringer* about the use of aggravating factors which both narrow and determine, if

not presume, death are not present in the California scheme. The discussion in *Stringer* on the use of a vague aggravating factor in the weighing process *Stringer*, 117 L. Ed. 2d at 382 simply emphasizes that a jury whose discretion has not been narrowed in the guilt phase because of an inadequate aggravating factor, cannot satisfy the mandate of *Furman v. Georgia* 408 US. 238 (1972) in the penalty phase by weighing any mitigation against the illusory aggravation.

The requirement of a special circumstance in California, adequately "limits the death sentence to a small subclass of capital-eligible cases." *Pulley v. Harris*, 465 U.S. 37, 53, 79 L. Ed. 2d 29, 104 S. Ct. 871 (1984). Unlike Mississippi, where the finding of an aggravating circumstance alone authorizes death unless the jury finds mitigation outweighs any aggravating circumstance, a special circumstance finding in California creates no presumption that death is appropriate.[6/]

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6. In California, the jury takes into account 11 statutory factors, if relevant, as well as any non-statutory mitigating evidence presented by the defendant. Cal. Penal Code § 190.3. If the jury concludes that the aggravating factors outweigh the mitigating factors, it returns a sentence of death. If it finds that the mitigating factors outweigh the aggravating factors it returns a sentence of life without possibility of parole. Cal. Penal Code, § 190.3.

There is no presumption that death is appropriate at the sentencing phase. *People v. Andrews*, 49 Cal. 3d 200, 230, 260 Cal. Rptr. 583, 776 P.2d 285 (1989). Apart from the requirement that the state prove prior uncharged criminal activity beyond a reasonable doubt *People v. Robertson*, 33 Cal. 3d 21, 53, 188 Cal.Rptr. 77, 655 P.2d 279 (1982), neither side has any burden of proof with respect to aggravation, mitigation, or the appropriateness of death. *People v. Frierson*, 25 Cal. 3d 142, 180, 158 Cal. Rptr. 281, 599 P.2d 587 (1979).

Moreover, Petitioner's argument that sentencing factors in section 190.3 are subject to independent vagueness analysis was impliedly rejected by this Court in *Zant*. *Zant* noted that a factor which may be defective for purposes of narrowing the class of death-eligible defendants may nevertheless be beyond Eighth Amendment challenge when used to warrant imposition of death on a defendant otherwise determined to be eligible for that penalty. *Zant*, 462 U.S. at 875. In light of *Zant*, California's sentencing factors in section 190.3 are not subject to Eighth Amendment vagueness analysis.

In summary then, the special circumstances in California adequately narrow the death-eligible class, while the statutory aggravating and mitigating factors enumerated in section 190.3 merely provide guidance to the jury regarding information it should consider in determining the appropriate penalty. The vagueness concerns set forth in *Stringer* thus have no application to the factors embodied in Cal. Penal Code section 190.3.

II.

NEITHER THE PROSECUTOR'S ARGUMENT NOR THE JURY INSTRUCTIONS EXACERBATED THE ALLEGED VAGUENESS OF THE STATUTORY SENTENCING FACTORS CONSIDERED BY THE JURY WHICH SELECTED THE DEATH PENALTY

Again for the first time, petitioner now claims that the prosecutor's argument and the jury instructions in this case supposedly exacerbated the alleged vagueness of the 11 sentencing factors listed in Penal Code section 190.3 which the jury relied upon to select the death penalty as the appropriate punishment for petitioner's vicious murder of Ms. Stendal. This claim is not properly before this Court since it was not raised below and lacks merit in any event.

Here, it is true that petitioner did challenge the giving of the then applicable standard jury instruction (CALJIC No. 8.84.2), which lists the 11 sentencing factors to be considered by the jury. It is not true that he did so within the context of a constitutional vagueness challenge. Instead, on his direct appeal, petitioner argued that the giving of CALJIC No. 8.84.2 was improper because this instruction allegedly compelled the jury to select the death penalty if the aggravating circumstances outweigh the mitigating ones. In California, this is referred to as a "Brown" argument in reference to the California Supreme Court's decision in *People v. Brown*, 40 Cal.3d 512 (1985) (rev.d on other grounds in *California v. Brown*, 479 U.S. 538 (1987)) which upheld the validity of section 190.3, while acknowledging that an instruction incorporating the

mandatory language of the section "might mislead jurors as to the scope of their sentencing discretion and responsibility." (*People v. Bonin*, 46 Cal.3d 659, 706 (1988); *People v. Hamilton*, 45 Cal.3d 351, 370 (1988).)

The argument which petitioner now seeks to advance for the first time in these proceedings is also somewhat misleading since petitioner fails to mention that the trial court gave an additional clarifying instruction to supplement CALJIC No. 8.84.2. Opn. p. 62.

Nor did petitioner argue in his direct appeal that the prosecutor's comments or argument at the penalty phase increased or exploited the vagueness of the sentencing factors listed in Penal Code section 190.3. In short, petitioner has only recently decided to raise this claim and his failure to present either aspect of this claim at an earlier opportunity bars consideration now.

Even if this argument is properly before this Court, it still lacks substantive merit and must be dismissed. Thus, petitioner claims that the prosecutor capitalized on the vagueness of the sentencing factors by arguing that the jury could consider the absence of factors traditionally regarded to be either neutral or mitigating as factors in aggravation. This claim was raised in his direct appeal as an assertion of *"Davenport"* error. See *People* v. *Davenport*, 41 Cal.3d 247, 288-

290 (1985). In his direct appeal, petitioner only alleged *Davenport* error as to three sentencing factors.[7]

In this proceeding, petitioner has changed his claim and now alleges that the prosecutor improperly argued that the jury could consider the absence of six neutral or mitigating circumstances as factors in aggravation. Pet. pp. 19-20.

Neither the prosecutor's argument nor the jury instructions were misleading. Here the instructions given in this case implied that the jury's decision as to penalty was not to be automatic or mechanical. The jury twice was informed it had the duty to decide which of the two possible punishments should be imposed, was advised to consider the evidence, the arguments of counsel, and the aggravating and mitigating factors "if applicable," and was told that if a factor was not found to be mitigating, that circumstance did not render it an aggravating factor unless the jury determined it to be aggravating beyond a reasonable doubt. At petitioner's request, the jury was instructed that it was obligated to weigh the sympathetic elements of defendant's background against those which might offend the conscience, and in so doing, it could consider pity, sympathy, and mercy for defendant, but that it could not be governed by conjecture, prejudice, or public opinion. The jury

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7. In his direct appeal petitioner alleged the prosecutor had committed *Davenport* error with respect to factor (d) the absence of evidence of a mental disturbance; factor (e) the victims lack of consent or participation; and factor (f) lack of any reasonable belief in justification. Opn. p. 56.

also was instructed that petitioner and the prosecution were entitled to the individual opinion of each juror.

Finally, the comments of defense counsel underscored the jury's discretion to decide which penalty was appropriate under the circumstances: counsel advised the jurors that each of them had an independent, singular responsibility to determine the punishment, that it was not a democratic or community effort, and that each would have to live with the verdict. Defense counsel told the jurors to consider and weigh the factors, as they felt appropriate. (See *People v. Grant*, 45 Cal.3d 829, 856-857 (1988); *People v. William*, 44 Cal.3d 1127, 1149 (1988).) Moreover, defense counsel stressed that the most important factor, a factor in mitigation, was the absence of any violence in defendant's past, thereby underscoring the jurors' duty to consider the factors individually.

From the arguments both of the prosecutor and defense counsel, and from the instructions, the jurors in this case clearly understood that they were required to determine the appropriate penalty for petitioner by weighing and considering the enumerated factors. (*People v. Burton*, 48 Cal.3d 843, 873 (1989).) Viewing the instructions and arguments as a whole, the California Supreme Court was properly satisfied there is "no reasonable likelihood that the jury was misled as to the scope of its sentencing responsibility." Opn. p. 66.

III.

THE JURY AT PENALTY PHASE PROPERLY CONSIDERED THE CIRCUMSTANCES OF THE MURDER IN DECIDING WHETHER THE DEATH PENALTY WAS APPROPRIATE

Petitioner argues that the jury, at the second penalty trial which selected death as the appropriate punishment, improperly considered the circumstances of the murder in deciding the appropriate punishment.

To understand this claim, it is necessary to briefly review the proceedings which occurred after the original jury in Shasta County returned its guilty and special circumstance verdicts on December 20, 1982. Following the guilt phase verdicts, the same jury reconvened to consider the penalty phase. The jury heard evidence, arguments and instruction but was unable to reach a verdict and a mistrial was declared for the penalty phase.

At this point, petitioner renewed his change of venue motion asking that the matter be transferred out of Shasta County for retrial of the penalty phase because of the publicity which accompanied the guilt phase verdicts. The trial court granted petitioner's motion, and the case was transferred to Sacramento County for retrial of the penalty phase.

At no point did petitioner object to these proceedings, in fact, just the opposite is true. It is petitioner who requested and received the change of venue to Sacramento County for the penalty phase retrial.

Petitioner notes that his renewed motion for a change of venue was granted, moving the second penalty trial to Sacramento County after the original jury, which heard the guilt phase of his trial in Shasta County, was unable to reach a verdict at the first penalty trial.

Petitioner argues that allowing the jury in the second penalty trial to consider whether the circumstances of the crime (§ 190.3(a)) was an aggravating factor violated his Eighth Amendment rights to a reliable penalty determination.

The California Supreme Court rejected this contention noting that:

> "The United States Supreme Court itself has established that the circumstances surrounding a capital offense constitute one of the criteria upon which the jury *should* base its penalty determination. (See, e.g., *Penry* v. *Lynaugh* (1989) 492 U.S. 302, 318, 106 L.Ed.2d 256, 109 S.Ct. 2934; *Booth* v. *Maryland* (1987) 482 U.S. 496, 502, 96 L.Ed.2d 440, 107 S.Ct. 2529, overruled on other grounds in *Payne* v. *Tennessee* (1991) ___ U.S. ___, 115 L.Ed.2d 720, 111 S.Ct. 2597; *Jurek* v. *Texas* (1976) 428 U.S. 262, 304, 49 L.Ed.2d 944, 96 S.Ct. 2950 (plur. opn.). The high court has not stated or implied that the factor of the "circumstances of the offense" is unconstitutionally vague. (Opn. p. 69.)

With respect to petitioner's claim that section 190.3 is unconstitutional as applied to him because, unlike the typical case where the same jury determines both issues of guilt and penalty, his case afforded the jurors only one opportunity to express their outrage at the crimes he committed, the California Supreme Court specifically found that:

> "Nothing in the evidence, the arguments of counsel, or the instructions supports this assertion. Furthermore, because it was defendant who requested the change of

venue and, by definition, the new jury, he is not in a position to claim prejudice from the granting of his motion. We also note that defendant has provided no authority for the proposition that, when a new penalty jury has been impaneled, the state may not permit the jury to determine the appropriate punishment on the basis of the same criteria that would have applied had a single jury determined both issues of guilt and penalty. Defendant has not provided any basis for us to conclude section 190.3 is unconstitutional." (Opn. p. 70.)

In the instant application for a writ of certiorari, no additional basis for relief has been provided and petitioner's claim therefore still lacks merit.

IV.

EVEN ASSUMING ARGUENDO AN EIGHTH AMENDMENT VAGUENESS ANALYSIS WERE APPROPRIATE HERE, PETITIONER'S VAGUENESS CONTENTIONS ARE MERITLESS

As previously mentioned, petitioner specifically challenges the constitutional vagueness of all 11 factors enumerated in California Penal Code section 190.3. Even if the Eighth Amendment vagueness concerns of *Stringer* have any application to the factors set forth in section 190.3, petitioner's complaints are meritless since these 11 factors are not vague or imprecise.

In the instant case, the prosecutor at the penalty trial acknowledged that factors (b) (lack of a defendant's record of prior violent conduct) and (i) (defendant's age) could arguably be considered to be mitigating factors. In his direct appeal, petitioner conceded that the prosecutor properly argued that the circumstances of the offense (factor (a)) and petitioner's prior conviction (factor (c)) were aggravating factors.

As previously noted, in his automatic appeal petitioner only alleged *Davenport* error with respect to the prosecutor's remarks or arguments regarding three of the factors (i.e., (d), (e), and (f)). Opn., at p. 56.

The California Supreme Court noted that the argument in this case took place *before* its decision in *Davenport* and that defense counsel did not object to this portion of the

prosecutor's argument. The California Supreme Court also held that "it is not reasonably possible that any mischaracterization by the prosecutor could have influenced the sentencing decision of a reasonable jury." Opn., at p. 58.

Petitioner now attempts to claim that the prosecutor improperly argued that six of the statutory sentencing factors (factors (d), (e), (f), (g), (h) and (j)) were either present as aggravating factors or that the absence of a mitigating factor could itself be considered to be a factor in aggravation. This is the first time petitioner has raised this issue within the context of a vagueness challenge nor were three of these factors mentioned in connection with petitioner's *Davenport* claim.

Whether considered separately or as a whole, there is simply no merit to petitioner's vagueness challenge to all of the factors listed in Penal Code section 190.3.

For example, contrary to petitioner's challenge to Penal Code section 190.3(a), this Court has established that the circumstances surrounding a capital offense as one of the criteria upon which a jury *should* base its penalty determination. See e.g., *Penry v. Lynaugh*, 492 U.S. 302, 318, 106 L.Ed.2d 256, 109 S.Ct. 2934 (1989); *Booth v. Maryland*, 482 U.S. 496, 502, 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987), overruled on other grounds, *Payne v. Tennessee*, 501 U.S. ___, 115 L. Ed.2d 720, 111 S.Ct. 2597 (1991); *Jurek v. Texas*, 428 U.S. 262, 274, 49 L.Ed.2d 929, 96 S.Ct. 2950 (1976). Moreover, there is no authority stating or implying that the "circumstances of the

offense" is unconstitutionally vague. *Jurek v. Texas*, 428 U.S. at 274.

Admittedly, the Eighth Amendment mandates an individualized penalty determination. *Eddings v. Oklahoma*, 455 U.S. 104, 110-112, 71 L. Ed. 2d 1, 8-9, 102 S. Ct. 869 (1982). It is also apparent, however, that this mandate for individualized penalty determinations makes it inevitable that sentencers will apply their own values, perceptions and experiences to the factors the state properly deems relevant. *People v. Tuilaepa*, 4 Cal. 4th 569, 594-595, 15 Cal. Rptr. 2d 382, 842 P.2d 1142 (1992).

In one of its most recent opinions, the California Supreme Court has rejected a claim that the sentencing factors set forth in Penal Code section 190.3 are unconstitutionally vague under *Stringer*:

> "We have held that, assuming our statute is subject to the rationale of *Stringer*, factors (a) (circumstances of crimes adjudicated in capital guilt proceeding), (b) (other violent criminal activity), and (i) (defendant's age at time of capital crime) withstand vagueness challenges. Each of these factors `[directs] the sentencer's attention to specific, provable, and commonly understandable facts about the defendant and the capital crime that might bear on his moral culpability. . . .' (*People* v. *Tuilaepa*, *supra*, 4 Cal.4th 569, 595; see also *People* v. *Noguera* (1992) 4 Cal.4th 599, 648-649; *People* v. *Proctor*, *supra*, 4 Cal.4th 499, 550-551.) Similar considerations apply to factor (c) (prior felony convictions), and to factors (d) through (k), which further channel the sentencer's discretion by identifying additional `specific, provable, and commonly understandable facts' about the capital offense and offender which the state properly deems pertinent to the penalty determination.
>
> "Defendant urges that section 190.3 violates *Stringer* because it does not expressly identify which sentencing factors are aggravating and which are

mitigating. We disagree. We have noted that certain of the factors can only be mitigating (e.g., factors (d), (e), (f), (g), (h), and (k)), and we have further concluded that the mitigating nature of these factors is clear even in the face of contrary argument. (See discussion, *ante*, p. _____ [typed maj. opn. pp. 73-75.) The aggravating nature of certain other factors (e.g., factors (b([`other' violent criminal activity], (c) [prior felony convictions]) is equally apparent. Still other factors may allow either aggravating or mitigating consideration, depending on the particular circumstances. However, so long as they focus the sentencer's consideration on `specific, provable, and commonly understandable facts' that properly bear on the appropriate penalty, they cannot be deemed unconstitutionally vague `simply because they leave the sentencer free to evaluate the evidence in accordance with his or her own subjective values.' (*People* v. *Tuilsepa*, *supra*, 4 Cal.4th 569, 595.) Defendant's challenge must be rejected." *People* v. *Montiel*, Slip Opn. filed August 12, 1993, in S004756, Opn. pp. 87-88.

Finally, *Stringer* itself makes it clear that an instruction incorporating a vague factor is subject to harmless-error analysis under the standard enunciated in *Chapman v. California*, 386 U.S. 18, 24, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967). *Stringer*, 117 L.Ed.2d at 383. Moreover, it is a state's high court that must make the harmless error analysis. Where a death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court must actually perform a new sentencing calculus, if the sentence is to stand. *Richmond*, 121 L.Ed.2d at 422.

Any possible vagueness in any factor used in petitioner's case was harmless beyond a reasonable doubt. Petitioner's savage attack on Ms. Stendal, his numerous stab wounds to her breasts which were inflicted for no other reason than torture, and her death by strangulation show petitioner to

be a cold-blooded killer deserving of death. See *People v. Payton*, 3 Cal.4th 1050, 1057-1059 (1992). Petitioner is under a judgment of death because of the wanton and vicious nature of his crime. No modification of a jury instruction or clarification of Penal Code section 190.3 would alter the result in his case. Even if petitioner's claim can be stretched to a violation of the Eighth Amendment, petitioner should nevertheless be denied relief.

CONCLUSION

For the foregoing reasons, respondent respectfully requests the Petition for Writ of Certiorari be denied.

Dated: August 19, 1993.

Respectfully submitted,

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